# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 690.

285

F. F. GREEN, APPELLANT,

*vs.*

THE MENOMINEE TRIBE OF INDIANS IN WISCONSIN AND THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 20, 1912.

(23,265)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 25, 1912.

1 I. *Petition, etc.*

Court of Claims.

No. 30179.

F. F. GREEN
vs.
THE MENOMINEE TRIBE OF INDIANS IN WISCONSIN.

The original petition was filed herein on June 8, 1908, to which the defendants, on April 25, 1910, filed a demurrer. This demurrer was argued and submitted October 17, 1910. On October 24, 1910, the Court filed an order overruling the demurrer. To this decision the defendants, on November 10, 1910, filed a motion for re-hearing. This motion was argued and submitted November 21, 1910. On January 16, 1911, the opinion of the Court, by Barney, J., was delivered, in which the demurrer was sustained as to the Menominee Tribe of Indians and overruled as to the individual Indians named in the petition, and leave was granted to the petitioner to amend his petition within 60 days. Subsequently, to wit, on March 11, 1911, the claimant filed his amended petition which appears later in this record.

2 II. *Answer of the Defendant Indians. Filed Dec.* 22, 1908.

In the Court of Claims.

No. 30179.

F. F. GREEN
vs.
THE MENOMINEE TRIBE OF INDIANS IN WISCONSIN.

Answer.

To the Chief Justice and Judges of the Court of Claims:

Now come the defendants herein and for answer respectfully show:

First. That they deny each and every allegation in complainant's petition contained.

Second. That the goods claimed by the petitioner herein to have been furnished to certain individuals, if so furnished, were furnished to the individuals named upon their individual credit and account and were not furnished upon the credit of the Menominee Tribe, nor upon any agreement or account with the said tribe.

Third. That many of the individuals against whom accounts are herein stated are now dead.

Fourth. That many other of the Individuals against whom accounts are herein stated were never engaged in logging operations upon the Menominee Reserve and that the goods, if so furnished to them as alleged were so furnished to them for other purposes than those contemplated in the act under which this action is brought.

Fifth. That many other of the persons against whom accounts are herein stated are not members of the Menominee Tribe of Indians but are persons not embraced within the provisions of the act conferring jurisdiction upon this court.

Sixth. That large quantities of the goods alleged herein to have been furnished to members of the Menominee Tribe, if so
3 furnished, were actually furnished for uses and purposes other than carrying on logging operations upon the Menominee Indian reservation in Wisconsin.

Wherefore the defendants pray that the petition herein may be dismissed and that the petitioner shall take nothing by his action.

HENRY S. COMSTOCK,
*Att'y for Defendants.*

W. S. FIELD,
*Of Counsel.*

III. *Claimant's Replication. Filed December* 31, 1908.

Replication.

For replication to defendants' plea, the claimant denies each and every material averment of fact therein contained and joins issue thereon.

DUDLEY & MICHENER,
*Attorneys for Claimant.*

[Endorsed:] In the Court of Claims. F. F. Green vs. Menominee Indians in Wisconsin. No. 30179. Answer. Henry S. Comstock, Att'y for Defendant; W. S. Field, of Counsel.

4 IV. *Claimant's Motion to Make the United States a Party Defendant. Filed May* 28, 1910.

Comes now the claimant and moves the court for leave to make the United States a party defendant in the above entitled case, and to amend the petition by adding the words "and the United States" after the name of the other party defendant.

DUDLEY & MICHENER,
*Attorneys for Claimant.*

The above motion was argued and submitted on November 21, 1910. On January 18, 1911, the Court filed an order allowing the same.

5 V. *Amended Petition. Filed March* 11, 1911.

No. 30179.

F. F. GREEN
vs.
THE MENOMINEE TRIBE OF INDIANS IN WISCONSIN and THE UNITED STATES.

Amended Petition.

To the Chief Justice and Judges of the Court of Claims:

Your petitioner respectfully represents and shows:

1. That he is a citizen of the United States and a resident of the State of Wisconsin.

2. That by virtue of the provisions of an act of Congress, entitled "An Act to authorize the Secretary of the Interior to issue patents in fee to purchasers of Indian lands under any law now existing or hereafter enacted, and for other purposes," approved on the 29th day of May, 1908, jurisdiction was conferred on this court to hear, determine and render final judgment, notwithstanding lapse of time or the statute of limitations, for any balance found due petitioner against or from the Menominee Tribe of Indians in Wisconsin, or any of them, for supplies, goods, wares, merchandise, tools and live stock furnished certain members of that tribe after January 1, 1880, for the purpose of carrying on logging operations upon the Menominee Indian Reservation in that state; and your petitioner avers that between the first day of January, 1886, to and including October 31, 1889, he and W. H. Stacy were duly licensed traders, in conformity with law, with the Menominee Tribe of Indians, who were then and now are under the care and guardianship of the United States, and within the country occupied by those Indians, known as the Menominee Reservation, Green Bay Agency, Wisconsin; that in the fall of 1886 the members of the tribe were in want, destitution, and without available means of support, and on the request of such Indians for the right to cut and sell timber from their reservation, the United States authorized and em-

6 powered the then Indian Agent for those Indians to permit the Indians to cut and sell the dead and down timber on such Reservation, ten per cent of the proceeds to go to the benefit of the said tribe and of those performing labor in that respect, and thus provide the Indians with means of support, as well as teach them industrious and thrifty habits, honesty and integrity. The Indians were not able to take advantage of such permission to cut and market that timber, for they were destitute and without means to purchase supplies, were without credit, and were unable to obtain it for that purpose. In order that the Indians might be relieved of their difficulties and their urgent necessities be provided for, it was agreed by the Indian Agent and the Head men of the tribe that if petitioner and W. H. Stacy would extend credit to the companies,

crews or squads of Indians that should be formed for the purpose of carrying on logging operations, and also extend a limited amount to their respective families, that the same method of payment for supplies so furnished should be continued, as had been agreed upon with the previous trader, M. Wescott, which method of payment was discussed and agreed upon by the Indian Agent and by the head men through their interpreter. That the said agreement with the said M. Wescott was entered into on or about the first day of December, 1881, under the conditions and to the effect stated below. On and before December first, 1881, the Menominee Indians were in a destitute condition, without credit or available means of support, and had procured the right to cut and sell the dead and down timber on their reservation, but were unable to engage in such work for the reason that they lacked equipment and supplies necessary for the prosecution thereof, and were unable to secure such equipment and supplies on account of lack of credit. That about said date the Commissioner of Indian Affairs sent one John A. Wright, of Baltimore, Maryland, a special agent, to the Menominee Reservation for the express purpose of making some arrangement whereby the Indians could obtain equipment and supplies necessary for engaging in logging operations. That thereupon a council
7 of the tribe was held at Keshena, Wisconsin, which was attended by all of the chiefs and head men of the tribe, and practically all the members thereof, and also by the Indian Agent, and it was thereupon agreed by and between the said M. Wescott as one party to the agreement, and the Menominee Indian Tribe as the other party thereto, that the said M. Wescott, the duly licensed Indian Trader, at Keshena, Wisconsin, should furnish necessary equipment and supplies to those members of the tribe who desired to engage in logging operations to enable them to carry on such work, and support their respective families while so engaged, such equipment and supplies not to exceed the sum of $2.50 for each thousand feet of logs so cut and sold; that all logs cut and hauled by the Menominee Tribe in the logging operations were to be sold through the Indian Agent to the highest and best bidder; and that the prices for such supplies as were to be furnished by the petitioner, should be such prices as were being paid in cash for similar supplies in that part of the state, with transportation added; that said Menominee Tribe promised and agreed that such equipment and supplies so furnished should be paid for out of the first proceeds from the sale of the logs so to be cut and sold. That said agreement was made with the consent and approval of the Indian Agent residing at Keshena, Wisconsin, and in charge of said Menominee Indian Reservation, and also by said special agent, John A. Wright. That said agreement had the unanimous approval of all members of the tribe present at said council. That said agreement was made orally by the said M. Westcott, personally, and by the chiefs and head men on behalf of said tribe, which method of agreement then was, and for a long time prior thereto had been the only method of entering into contracts by said Menominee Tribe of Indians; that the authority of the chiefs and head men of the tribe to contract for and

on behalf of the tribe had never been questioned by any member of said tribe, and that contracts so entered into had always been treated as valid and binding on the tribe, and fulfilled by the tribe, without objection on the part of any member thereof. That said
8 agreement and contract with the Menominee Tribe remained in force until the said M. Wescott ceased to be the licensed Indian Trader, and your petitioner was duly appointed as such in the fall of 1886.

That on or about the first of January, A. D. 1887, it was mutually agreed by and between your petitioner and W. H. Stacy on the one part, and the Menominee Tribe of Indians on the other, that the agreement above set out with M. Wescott should be continued in full force and effect with your petitioner and said W. H. Stacy. That said last mentioned agreement was made with your petitioner and W. H. Stacy, personally, and on behalf of the Menominee Tribe by the chiefs and head men thereof, which said chiefs and head men still continued to have and were recognized as having authority to make contracts in behalf of, and binding on said tribe. That said last mentioned agreement was approved by the Indian Agent at Keshena, Wisconsin, and was acquiesced in by all members of said tribe, and treated by all parties interested as valid and binding on the contracting parties. That your petitioner and the said W. H. Stacy furnished the equipment and supplies for which judgment is claimed in this action, in accordance with and relying upon said agreement, and did not and would not extend credit to the indivinal members of said tribe, but extended such credit solely to the tribe, relying upon said agreement.

3. The condition of the Indians remained such through the following winters and into the year 1889 that the petitioner and said W. H. Stacy, under and pursuant to the agreement above described, and with the approval of the Indian Agent and of the United States, were obliged to and did continue to furnish those Indians with supplies, and for the supplies so furnished said Indians the petitoner and said Stacy were promptly paid, with a few exceptions, until the year 1889, at which time and during that year and from that year until this time the Indians and the government of the United States failed to pay for the supplies furnished said Indians in that year. The following is a statement of the supplies furnished
9 as aforesaid, but which have not been paid for:

| | |
|---|---|
| Frank Waubone | $58.04 |
| Mose Pahtise | 47.00 |
| Mose Corn | 3.20 |
| Paul Baxter | 75.09 |
| Paul Ke ne bonay | 130.98 |
| Knete Quot Ke saw | 49.32 |
| Mose L. Bear | 41.13 |
| Peter Wytossa | 33.59 |
| Robert me so man | 10.26 |
| Louis Shawano | 32.84 |
| Catharine Dequndre | 19.42 |

| | |
|---|---|
| Frank Recloud | 11.93 |
| Antoine Stick | 199.69 |
| Peter Ke she not kow | 19.72 |
| Louis Keshena | 20.32 |
| J. D. Crignon | 45.39 |
| John Cardish | 39.16 |
| Peter Pahmonecote | 105.40 |
| Isaac At pak kiew | 65.75 |
| Mose Nunway | 47.11 |
| Jacob Mosomon | 6.38 |
| Joseph Ke che Kum | 42.92 |
| Mitchel Mackabee | 23.57 |
| Jos. Ashkechequam | 72.73 |
| Louis Tucker | 62.67 |
| Harret Iahmokeiw | 39.00 |
| John Dick | 100.77 |
| Peter Martin | 66.82 |
| Lewis Dodge | 163.91 |
| Gabe Pahmanstuck | 18.73 |
| Barney Waukecheon | 313.81 |
| John V. Satterlee | 176.88 |
| Joseph Peyanasset | 57.13 |
| Dave Kuh Kem me kiew | 33.57 |
| Kah mo won | 69.05 |
| Dave Iah sha to ka | 13.76 |
| Dominick Morgan | 21.07 |
| Fred Grignon & Co | 10.00 |
| Lewis Waukets | 7.63 |
| Eleck V. Corn | 61.02 |
| Charles Wescott | 39.92 |
| Gus Valandra | 176.69 |
| Joseph Oshkenaniew | 174.45 |
| John Keshenatassa | 14.97 |
| Jos. Payatch cuett | 57.08 |
| Chickney, Chief | 67.34 |
| Bill Keshkatapa | 25.07 |
| John Petetah | 180.17 |
| Alex. Peters | 2.08 |
| Lewis, Oshkenaniew | 367.45 |
| Peter Tomah | 183.79 |
| Fred Grignon | 288.81 |
| Chas. Somon | 13.51 |
| Linn Waupoose | 17.35 |
| Henry Melott | 176.43 |
| Noah Peters | 225.26 |
| Mitchel Wossan | ..... |
| Antoine Iah sha | 155.76 |
| John Tomoon | 116.53 |
| Mitchel Waubono | 21.85 |
| Mary A. Martin | 64.98 |
| Mose Sanapan | 23.04 |

| | |
|---|---|
| Jos. Grignon | 350.90 |
| Jerome Pynesha | 183.19 |
| Lyman Skesecks | 3.95 |
| John Wiscoby | 565.49 |
| Quahkesan & Co. | 45.63 |
| M. Bresbois & Co. | 461.35 |
| John Waupoose | 677.05 |
| Martin & Waukicheon | 76.77 |
| Barney Brisbois | 194.82 |
| Mose Sanapan | 12.88 |
| Mitchel Oshkenaniew | 454.32 |
| John Shanawet | 62.32 |
| John Latender | 827.17 |
| Mitchel Kosh Kosh Ka | 75.81 |
| Anton Waubono | 32.28 |
| Paul Davis | 7.84 |
| Chas. Baxter | 27.99 |
| Jos. Davis | 732.38 |
| Lewis Skesecks | 52.37 |
| Al Boyed | 731.79 |
| J. B. Waukoheon | 30.38 |
| Mose Maikauck | 15.02 |
| Shawancassha | 4.90 |
| Kasa Ashpahmasha | 10.40 |
| Geo. Payawaset | 64.94 |
| John L. Dodge | 43.06 |
| Aconomy Oshkosh | 44.19 |
| Jos. Lamette | 81.63 |
| Keshe ka niew | 3.00 |
| Chequa | 2.80 |
| J. Wiscoby | 151.17 |
| Chas. Chickney | 10.20 |
| Lewis Komanakin | 89.18 |
| Jo Nosecum | 76.42 |
| Jos. La Fransbois | 34.20 |
| William Prickett | 25.72 |
| Stebe Askamett | 28.24 |
| Mitchel Kah pah o sha | 55.43 |
| Mose McKimatas | 3.40 |
| Mose Corn | 17.07 |
| Pah mah kah na tuck | 3.40 |
| John Tucker | 8.83 |
| Jo nah wah quate | 32.44 |
| Mashequett & Co. | 144.73 |
| Mitchel Beaupre | 78.65 |
| Jo McKemetas | 342.64 |
| Sopha Grignon | 121.76 |
| The. Johnson | 147.83 |
| Simon Dodge | 24.13 |
| Jo Shawano Kesick | 80.91 |
| John Mashequett or Sanopau | 10.24 |

| | | |
|---|---|---|
| | John Pongleton | 3.69 |
| | Frank Moskowet | 8.10 |
| | Mose Tice | 4.31 |
| | Kow Keett | 7.29 |
| | Jo me ah wa non | 53.52 |
| | Lewe Durham | 20.81 |
| | Lewe Waupoose | 159.35 |
| | Mitchel Foxy | 7.91 |
| | Nespet | 53.86 |
| | Ah she ca tah | 10.00 |
| | John Menash | 28.20 |
| | Gus Corn | 3.40 |
| | Kosh Kesh e ka | 49.15 |
| | Pete Wascum | 2.41 |
| | Pah she mah Yesha | 15.16 |
| | Jos. Werhae | 5.95 |
| | Pah turn | 1.55 |
| | Nah yah to | 3.94 |
| | Way ma co no met | 32.51 |
| | Keokuk | 10.10 |
| | Jo Seymour or Corn | 18.38 |
| | Mitchel Shawanomeatto | 4.34 |
| | Pah man | 2.62 |
| | John Waukan | 24.42 |
| 11 | Waukeshan, Chief | 9.81 |
| | Pay a wa set | 85.55 |
| | She pe kan | 3.34 |
| | Louis Kah katch | 5.90 |
| | Ed Menominee | 9.02 |
| | Peter Che tank pah choka | 4.00 |
| | Soloma Match spato | 6.44 |
| | Mashaquett | 13.28 |
| | P. Akemart | 11.88 |
| | Mitch. Lamotte | 6.10 |
| | Albert La Rush | 5.76 |
| | Louis La Franbois | 103.70 |
| | Peter Fly | 18.76 |
| | Sam Pahwasha | 3.85 |
| | Peter Wa was cum | 5.35 |
| | J. B. Beaupre | 9.45 |
| | Jim Pah me watt | 11.58 |
| | Aha rah man | 10.45 |
| | M. Wy tossa | 2.83 |
| | John Corn | 11.68 |
| | Mary Lamotte | 11.40 |

4. Petitioner and said Stacy, in complying with the contracts and to avoid any extensive and unwarranted amounts of credit, inaugurated, at their own expense, a system of accounting, whereby they made a careful count of the logs cut and hauled by the companies, squads and individuals of the Indians, as well as the supplies fur-

nished them for their benefit and for and on behalf of the tribe. All the supplies furnished to the Indians, after the making of the agreements aforesaid, were of good quality and were sold, delivered and supplied to that tribe in the manner in this petition stated, and at the prices thus agreed upon.

Petitioner avers that the Indian Agent at the Green Bay Agency received the proceeds of the sale of logs so cut, hauled, banked and delivered by the Indians who were furnished supplies by petitioner and said Stacy, which amounted to a large sum, and that if the proceeds of such sales had been applied by such Indian Agent to the payment of the supplies furnished by petitioner and Stacy in accordance with the agreements herein described, the bills and accounts for the supplies so furnished would all have been paid and satisfied, but such proceeds were not so applied.

Petitioner further says that the logging operations conducted and the credits extended by him and Stacy were for the benefit of the tribe, they received the entire benefit thereof, and they were thus enabled to support themselves and their families, which would
12 have been difficult, if not impossible, without the aid of such credit to enable them to carry on the logging operations.

Petitioner is informed and believes, and on such information and belief he avers, that there is a large fund in the possession of the United States to the credit and for the benefit of said Menominee Tribe of Indians, derived through their logging operations, and now amounting to more than a million and a half of dollars, which fund has been accumulated through the credit extended and assistance rendered by licensed traders to the Menominee Indians in logging operations.

5. Petitioner avers that in the autumn of 1886, when the agreement was reached between the United States, the Menominee Tribe of Indians, the said W. H. Stacy and this petitioner, the said Stacy was the duly licensed trader to and with the Menominee Indians on their reservation, and that petitioner was employed by the said Stacy to have, and therefore he did have, full charge and supervision over the entire business and matters pertaining to the several transactions had as in this petition set forth, all with the consent and under the control of the Commissioner of Indian Affairs and with an agreement ratified and confirmed by such Commissioner, whereby petitioner was to receive for his said services one-half of the profits to be derived from the business conducted under the license to the said Stacy as such trader. Petitioner further avers that when the term of said Stacy and the term of this petitioner as Indian traders to the Menominee Indians expired, and it became necessary to have an accounting to determine petitioner's interest in the proceeds of such business, litigation arose between petitioner and said Stacy and a receiver was appointed to take charge of the affairs and matters of that business, and such receiver did take charge thereof and of the assets and liabilities and made an accounting of the same to the court having jurisdiction of such litigation, and thereafter such proceedings were had under the order and direction of such court that all

the assets of said business, including the accounts and claims
13 herein sued upon, were put up for sale by the said receiver and they were sold to this petitioner, including the accounts, claims and demands, rights and credits sued upon in this petition, and the same were delivered to the petitioner, together with all books of account, and since that time have been and now are his exclusive property and in his possession, no assignment or sale of any portion thereof having been made by this petitioner to any other person or to any corporation.

6. Your petitioner avers that there is due him from the Menominee Tribe of Indians, or from the individual members thereof, as may be found and adjudicated by the court, the sum of Thirteen Thousand and Eighty-seven dollars, Forty-six Cents ($13,087.46).

Wherefore the petitioner prays judgment for Thirteen Thousand and Eighty-seven Dollars, Forty six Cents ($13,087.46).

DUDLEY & MICHENER,
*Attorneys of Record.*

14 DISTRICT OF COLUMBIA, *ss:*

Louis T. Michener being duly sworn deposes and says that he is a member of the partnership of Dudley & Michener, such partnership being authorized by power of attorney in this case filed, to make affidavit; that he has read and understands the foregoing amendments to the petition; and that he is informed and believes that the statements therein contained are true in substance and in fact.

LOUIS T. MICHENER.

Subscribed and sworn to before me this 11th day of March, 1911.
[SEAL.] HERBERT L. FRANC,
*Notary Public, D. C.*

15 VI. *Demurrer to Amended Petition. Filed March* 28, 1911.

Now come the defendants, by the Attorney General of the United States, and demurring to the amended petition filed in this cause, state as the ground thereof that the act of Congress of May 29, 1908 (35 Stat., 444, 445), referring the claim to this court, did not authorize the claimant to institute a suit against the United States.

And further demurring to the said amended petition, state as the ground thereof that the amendment to the original petition of the claimant constitutes an entirely new case by changing the alleged agreement with the tribe from a guarantee for the debts of the individual members to an assumption by the tribe of all liability upon said claim to the said claimant.

And further demurring to the said amended petition, state as the ground thereof that the act conferring jurisdiction upon this court was enacted by Congress in violation of the fifth amendment to the Constitution of the United States, and conferred no jurisdiction upon this court to consider the subject-matter of the said petition.

And further demurring to the said amended petition, state as the ground thereof that the petition does not allege facts sufficient to constitute a cause of action.

JOHN Q. THOMPSON,
*Assistant Attorney General.*

GEORGE M. ANDERSON, *Attorney.*

16 VII. *Argument and Submission of Demurrer.*

On December 11, 1911, the demurrer of the defendants to the amended petition of the claimant came on to be heard. Mr. George M. Anderson was heard in support of the demurrer. Mr. Louis T. Michener was heard in opposition thereto and the demurrer was submitted.

17 VIII. *Per Curiam. Filed February* 12, 1912.

F. F. GREEN
v.
THE MENOMINEE TRIBE OF INDIANS IN WISCONSIN and THE UNITED STATES.

*Per Curiam:*

The questions herein arise on the defendants' demurrer to the amended petition on substantially the same grounds as those assigned on the demurrer to the original petition, which were, in substance, (1) that the jurisdictional act of May 29, 1908 (35 Stat. L., 444, 445), was in violation of certain provisions of the Constitution of the United States, and (2) that the facts averred were not sufficient to constitute a cause of action.

In the original petition the claimant, by the averments thereof, sought to fix liability upon the tribe as guarantor or upon the individual members thereof for the supplies furnished them by the claimant, as therein alleged, and judgment was prayed accordingly.

The material averments of the original petition are set forth in the opinion of the court (46 C. Cls., —), and need not be repeated here further than to say that by the second paragraph thereof it is averred in substance that "it was agreed by and through the Indian agent and the head men of the Menominee Tribe, to and with this petitioner and said Stacy, that the Menominee Tribe of Indians would indemnify petitioner and said Stacy and assure the payment to them of all supplies so to be furnished by them."

The demurrer, as to the liability of the tribe, was sustained with leave to amend and overruled as to the liability of the individual Indians, the court, among other things, saying:

"We are instructed in the jurisdictional act to 'determine if such liability be that of said Menominee Tribe of Indians as a tribe or that of individual members of the tribe.' It appears to us that the promise or 'indemnity' of the Menominee Tribe of Indians as alleged

is but a promise to pay the debt of another and clearly within the statute of frauds. There is no averment in the petition of any act indicating that the credit for the goods sold was given to the tribe. In fact every averment shows that the credit was given to the Indians individually, and the tribe was simply a guarantor."

And further commenting on the effect of a promise of indemnity, with various citations of authorities in support of the propositions stated, the court said:

"It is nowhere alleged in the petition that any part of the proceeds received for the logs which were cut went into the tribal
18 funds. We have no hesitancy in deciding that under the averments of the petition the Menominee Tribe of Indians is but a naked guarantor for the debt of another, and such promise not being in writing is void under the statute of frauds.

"It might further be added that it is very doubtful whether the 'head men' of the tribe, or the tribe in any manner, had any right to make such a contract as stated in the petition, even if it was in writing." (R. S., 2103-2106.)

Since that decision the claimant has amended the second paragraph of his petition; and after stating therein that 10 per cent of the proceeds arising from the sale of timber were to go to the benefit of the tribe, it is averred in substance, that in December, 1881, the tribe was in a destitute condition, without credit or available means of support, and that while they had procured the right to cut and sell dead and down timber on the reservation they were unable to go ahead for the reason that they lacked the equipment and supplies necessary therefor; that to meet their necessities the chiefs and head men of the tribe, with the consent of the members thereof in council, as well as with the approval of the Indian agent, entered into an oral agreement with one Wescott, the then duly licensed Indian trader, whereby the tribe agreed that payment for all supplies furnished to the individual members should be made out of the first proceeds arising from the sale of logs, such sale to be made through the Indian agent, not, however, exceeding $2.50 for each thousand feet of logs cut and sold, which agreement, it is further averred in substance, was continued in 1887 in full force by the chiefs and head men, acting for the tribe, with the claimant and his then associate Stacy, who had in 1887 succeeded said Wescott as Indian trader, and, further, that the supplies so furnished by the claimant under the agreement so continued were up to 1889 paid for, but that thereafter the supplies so furnished to the individual members, amounting in the aggregate to $13,087.46, remain unpaid for. Hence this action.

It will be observed that in the opinion ruling on the demurrer to the original petition doubt was expressed as to whether the head men of the tribe or the tribe in any manner could contract, even if in writing, without the approval of the Secretary of the Interior, as provided by Revised Statutes, sections 2103 to 2106, wherein, by section 2103, it is provided in substance that no agreement shall be made by any person with any tribe of Indians or member thereof not citizens of the United States for the payment or delivery of

money or other thing of value relative to their lands or to any claims growing out of or in reference to annuities, installments, or other money claims, demand or thing under laws or treaties with the United States or official acts of any officer thereof, describing minutely the manner in which such agreement shall be made.

It is therefore clear that if the Indians are not citizens no right of action can be founded upon the oral agreement averred in the petition unless the claimant is relieved therefrom by the provisions of the jurisdictional act. That act, it must be noted, does not create a claim or declare any liability. It does waive the statute of limitations and confers upon the court authority to determine and render final judgment for any balance found due for supplies, goods, etc., furnished members of said tribe after the 1st day of January, 1880.

19 The act in express terms directs the court, first, to ascertain the amount due, if any, and whether any liability exists therefor, and "then determine if such liability be that of the said Menominee Tribe of Indians as a tribe or that of individual members of said tribe."

It will be observed that the provisions of section 2103 of the Revised Statutes referred to apply only to those Indians who were "not citizens of the United States." It follows that if they were citizens of the United States at the time of the alleged agreement the courts of Wisconsin had jurisdiction to adjudicate such claims, whether such contract be treated as express or implied. (Stacy v. La Belle, 99 Wis., 524; Ingraham v. Ward, 56 Kans., 550, and cases there cited.) If they were not citizens of the United States, then the agreement so made can not be enforced in this court, as the same was not reduced to writing with the approval of the Secretary of the Interior as provided by statute.

The action of the Commissioner of Indians Affairs in sending a special agent, as averred, to make some arrangement whereby the Indians could obtain equipment and supplies to enable them to engage in logging business can not, even with the approval as alleged of the Indian agent, be construed as authority to create a liability against the tribal funds. On the contrary, it is averred that payment was to be made "out of the first proceeds from the sale of logs so to be cut and sold." This is the extent of the tribal liability. It is not shown that the tribe as such received, or were to receive, any of the supplies so furnished under the terms of the agreement.

The tribe was not sponsor in the sense of surety for the members of the tribe, as they were not charged with payment, but the tribe, through its chiefs and headmen, agreed that the first proceeds arisings from the sale of the logs through the Indian agent should be applied to the payment of supplies so furnished.

As averred in the fourth paragraph of the petition the Indian agent "received the proceeds of the sale of logs so cut, hauled, banked, and delivered by the Indians who were furnished supplies by petitioner," who, it is in substance averred, failed to pay the claimant for such supplies; but the tribe can not be held responsible for his neglect; nor can a liability be created therefor against the tribe, as

the extent of the liability of the tribe under the agreement was that the proceeds arising from the sale should be first applied to the payment of supplies so furnished. The default of the agent can not be construed as the default of the tribe.

It follows, therefore, that whether the defendant Indians were or were not citizens of the United States no liability attached to the tribe.

Having reached this conclusion it is unnecessary to consider other questions raised by counsel.

The demurrer is sustained and petition dismissed.

20 IX. *Judgment of the Court.*

No. 30179.

F. F. GREEN
v.
THE MENOMINEE TRIBE OF INDIANS IN WISCONSIN and THE UNITED STATES.

At a Court of Claims held in the City of Washington on the 12th day of February, 1912, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants, and do order, adjudge and decree, that the demurrer of the defendants be sustained and that the petition of the claimant, F. F. Green, be, and the same is hereby, dismissed.

By THE COURT.

X. *Claimant's Application for, and Allowance of, Appeal.*

The claimant makes application for an appeal to the Supreme Court of the United States from the judgment heretofore rendered by this Court in the above entitled case.

DUDLEY & MICHENER,
*Attorneys for Claimant.*

Filed May 11, 1912.

Ordered: That the above appeal be allowed as prayed for.

By THE COURT.

June 17, 1912.

21 Court of Claims.

No. 30179.

F. F. GREEN
vs.
THE MENOMINEE TRIBE OF INDIANS IN WISCONSIN and THE UNITED STATES.

I, Archibald Hopkins, Chief Clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the Per curiam filed by the Court; of the final judgment of the Court; of the application of the claimant for, and the allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 20″ day of June, A. D. 1912.

[Seal Court of Claims.]

ARCHIBALD HOPKINS,
*Chief Clerk Court of Claims.*

Endorsed on cover: File No. 23,265. Court of Claims. Term No. 690. F. F. Green, appellant, vs. The Menominee Tribe of Indians in Wisconsin and The United States. Filed June 20, 1912. File No. 23,265.

5

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1913.

F. F. GREEN, APPELLANT,
*vs.*
THE MENOMINEE TRIBE OF INDIANS IN WISCONSIN AND THE UNITED STATES. } Number 285.

## APPEAL FROM THE COURT OF CLAIMS.

## APPELLANT'S BRIEF.

L. T. MICHENER,
P. G. MICHENER,
C. F. DILLETT,
*Attys. for Appellant.*

J. D. MILAND & SONS LAW PRINTERS, 703 6TH ST. N. W. WASH. D. C.

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THE MENOMINEE TRIBE OF INDIANS IN WISCONSIN AND THE UNITED STATES. } Number 285.

## APPEAL FROM THE COURT OF CLAIMS.

### Statement of Case.

1. The original petition was filed in the court below June 8, 1908. The tribe filed an answer in six paragraphs Dec. 22, 1908 (R. 1, 2). A demurrer to the petition was filed April 25, 1910, and the court sustained it as to the Menominee Tribe January 16, 1911 (R. 1), but gave petitioner leave to file an amended petition within sixty days (R. 1), 46 C. Cls., 68, 77.

The original petition did not make the United States a party defendant, but on a motion to that effect filed by the claimant the court allowed that to be done (R. 2).

2. The amended petition was filed March 11, 1911 (R.

3-10). We shall summarize it in chronological order.

(a) After pleading the jurisdictional act, the petitioner alleges that he and W. H. Stacy, from January 1, 1886, to and including October 31, 1889, were duly licensed traders, in conformity with law, with the Menominee Tribe of Indians, who were then and now are under the care and guardianship of the United States in the Menominee Reservation, Green Bay Agency, Wisconsin.

(b) On or about the first day of December, 1881, the Indians were in a destitute condition, without credit or available means of support, and had procured the right to cut and sell the dead and down timber on their reservation, but were unable to do so because they lacked equipment and supplies, and they were unable to secure equipment and supplies on account of lack of credit. The Commissioner of Indian Affairs sent a special agent to the reservation for the express purpose of making some arrangement whereby the Indians could obtain equipment and supplies necessary for engaging in logging operations. A council of the tribe was held at Keshena, which was attended by all the chiefs and head men of the tribe and practically all of the members thereof, as well as by the Indian Agent. It was thereupon agreed by and between the tribe and M. Wescott, the duly licensed Indian Trader, that he should furnish the necessary equipment and supplies to those members of the tribe who desired to engage in logging operation, so as to enable them to carry on the work and to support their families while so engaged, such equipment and supplies not to exceed the sum of $2.50 for each thousand feet of logs so cut and sold. The logs were to be sold through the Indian Agent to the highest and best bidder, and the prices for such

supplies should be such as were being paid in cash for similar supplies in that part of the State, with transportation added. The Menominee Tribe promised and agreed that such equipment and supplies should be paid for out of the first proceeds from the sale of the logs cut and sold. The agreement was made with the consent and approval of the Indian Agent and the special agent sent there by the Commissioner of Indian Affairs, and it had the unanimous approval of all members of the tribe present at the council. The agreement was made orally by Westcott, the trader, and by the chiefs and head men on behalf of the tribe, which method of agreement then was and for a long time prior thereto had been the only method of entering into contracts by that tribe, and the authority of the chiefs and head men of the tribe to contract for and on behalf of the tribe had never been questioned by any of its members, but contracts so entered into had always been treated as valid and binding on the tribe and had been fulfilled by it without objection on the part of any member. That agreement remained in force until Westcott ceased to be the licensed Indian Trader, and until the petitioner was duly appointed as such in the fall of 1886 (R. 4, 5).

(c) In the fall of 1886, the members and the tribe were in want and destitution, without available means of support, and on the request of such Indians for the right to cut and sell timber from the reservation, the United States authorized and empowered the then Indian Agent for those Indians to permit them to cut and sell the dead and down timber on the reservation, ten per cent. of the proceeds to go to the benefit of the tribe and those performing labor in that respect, and thus provide the Indians with means of support, as well as teach

them industrious and thrifty habits, honesty, and integrity. The Indians were not able to take advantage of such permission to cut and market the timber, for they were destitute and without means to purchase supplies, were without credit, and were unable to obtain it for that purpose.

In order that the Indians might be relieved of their difficulties and their urgent necessities be provided for, it was agreed by the Indian Agent and the head men of the tribe that if petitioner and W. H. Stacy, who were Indian Traders there as before stated, would extend credit to the companies, crews, or squads of Indians that should be formed for the purpose of carrying on logging operations, and also extend a limited amount to their respective families, the same method of payment for supplies so furnished should be continued as had been agreed upon with the previous trader, Westcott, which method of payment was discussed and agreed upon by the Indian Agent and by the head men through their interpreter (R. 3, 4). It was mutually agreed by and between petitioner and Stacy on the one part, and the Menominee Tribe on the other, that the agreement with Westcott should be continued in full force and effect with petitioner and Stacy. This agreement was made with petitioner and Stacy personally, and on behalf of the Menominee Tribe it was made by the chiefs and head men thereof, which chiefs and head men still continued to have and were recognized as having authority to make contracts in behalf of and binding on the tribe. This agreement was approved by the Indian Agent, was acquiesced in by all members of the tribe, and was treated by all parties interested as valid and binding on the contracting parties.

Petitioner and Stacy furnished the equipment and supplies sued for in this action, in accordance with and relying upon that agreement, and they did not and would not extend credit to the individual members of the tribe, but extended it solely to the tribe (R. 5).

(d) The condition of the Indians remained such through the following winters and into the year 1889, that petitioner and Stacy, under the agreement, and with the approval of the Indian Agent, were obliged to and did furnish the Indians with supplies, and for the supplies so furnished the Indians the petitioner and Stacy were promptly paid with a few exceptions until the year 1889, at which time, and during that year and until the filing of the action, the Indians and the United States failed to pay for the supplies furnished the Indians in the year 1889 (R. 5).

The petition then states the names of Indians and the amount of supplies furnished each Indian in 1889 and not paid for. The number of Indians is 158 and the amount unpaid is $13,087.46 (R. 5-8, 10).

(e) Petitioner and Stacy inaugurated a system of accounting whereby they made a careful count of the logs cut and hauled by the Indians, as well as the supplies furnished them for their benefit and for and on behalf of the tribe. All the supplies were of good quality and were sold, delivered, and supplied to that tribe in the manner before stated and at the prices agreed upon (R. 8, 9).

(f) The Indian Agent at the Green Bay Agency received the proceeds of the sale of logs cut, hauled, banked and delivered by the Indians who were furnished supplies by petitioner and Stacy, and if the proceeds of such sales had been applied by the Indian Agent to the pay-

ment of the supplies so furnished all the bills and accounts for supplies would have been paid and satisfied, but such proceeds were not so applied, as before stated (R. 9).

(g) The logging operations above described, and the credits extended by petitioner and Stacy, were for the benefit of the tribe, and the individual Indians were thus enabled to support themselves and their families, which would have been difficult, if not impossible, without the aid of such credit to enable them to carry on the logging operations (R. 9).

(h) There is a large fund in the possession of the United States, to the credit and for the benefit of the Menominee tribe, derived through logging operations, and now amounting to more than a million and a half dollars, which fund has been accumulated through the credit extended and assistance rendered by licensed traders to those Indians in logging operations (R. 9).

The petition then avers that when the term of petitioner and Stacy as Indian Traders expired, and it became necessary to have an accounting to determine appellant's interest in the proceeds of the business, litigation arose between petitioner and Stacy and a receiver was appointed to take charge of the affairs and matters of that business, and that such proceedings were had that the court ordered all the assets of the business, including the accounts and claims sued upon, to be put up for sale by the receiver, which was done, and they were sold to petitioner (R. 9, 10).

## Proceedings in Court Below.

1. The defendants, by the Attorney General of the United States, demurred to the amended petition (R.

10). The court treated it as a joint demurrer, sustained it as to all the defendants, and dismissed the petition (R. 14). For the opinion see R. 11-14 and 47 C. Cls., 281. This opinion summarizes the previous opinion in 46 C. Cls., 68, and then argues that, whether the Indians were or were not citizens of the United States, no liability attached to the defendants.

2. Petitioner applied for an appeal to this court and it was allowed (R. 14), pursuant to the terms of the jurisdictional act.

### Assignment of Errors.

The Court of Claims erred:

1. In sustaining the demurrer.
2. And in dismissing the petition.

## BRIEF OF ARGUMENT.

### I.

### The Jurisdictional Act.

**Full jurisdiction was conferred on the Court of Claims by Section 2, Act of May 29, 1908 (35 Stat., 444).**

That section is as follows:

> "That jurisdiction be, and hereby is, conferred upon the Court of Claims of the United States to hear, determine, and render final judgment, notwithstanding lapse of time or statute of limitation, for any balances found due, without interest, with the right of appeal as in other cases, upon

the claim of H. W. Gilkey, Herman Hankwitz, Herman Hankwitz and Company, W. P. Cook and Brother, M. Westcott, J. A. Liege, assignee of J. F. Gauthier, F. F. Green and the heirs of Mitchell Mahchikaniew, traders, against the Menominee tribe of Indians in Wisconsin and against certain members of said tribe at the Green Bay Agency, for supplies, goods, wares, merchandise, tools, and live stock furnished certain members of the said tribe after the first day of January, in the year eighteen hundred and eighty, for the purpose of carrying on logging operations upon the Menominee Indian Reservation, in Wisconsin. Said claims shall be presented to said court by verified petitions to be filed within six months from the date of the approval of this Act.

"Said court shall, in rendering judgment, ascertain and determine the amount, if any, due upon each of said claims, and if the court find that there is a liability upon any of said claims, it shall then determine if such liability be that of the said Menominee tribe of Indians as a tribe or that of individual members of said tribe, and it shall render judgment for the amount, if any, found due from said tribe to any of said claimants, and it shall render judgment for the amounts, if any, found due from any of the individual members of said tribe to any of said claimants.

"Upon the rendition of final judgments, the court shall certify the same to the Secretary of the Interior, who shall thereupon, in case judgments be against the said Menominee tribe of Indians as a tribe, direct the payment of said judgments out of any funds in the Treasury of the United States to the credit of said tribe, and who, in case judgments be against the individual members of said Menominee tribe of Indians, shall through the disbursing officers in charge of said Green Bay Agency, pay, from any annuity due or

which may become due said Indian as an individual or as the head of a family from the United States or from the share of such Indian as an individual or as the head of a family in any distribution of tribal funds deposited in the Treasury of the United States, the amounts of such judgments to the claimants in whose favor such judgments have been rendered: *Provided*, That not more than fifty per centum of the annuity due any such Indian as an individual or as the head of a family shall be applied to the payment of such judgments: *Provided, however*, That if more than one judgment be rendered against any such individual Indian and if fifty per centum of the annuity due such Indian as an individual or as the head of a family be not sufficient to discharge such judgments, such payment shall be made to the claimants in proportion to the amount of their respective judgments: *Provided further*, That in case fifty per centum of any annuity payment due any such Indian as an individual or as the head of a family be not sufficient to satisfy the judgment or judgments rendered against said Indian, then and in that case fifty per centum of subsequent annuity payments due said Indian as an individual and as the head of a family shall be applied to the payment of said judgments until the same be fully satisfied.

"The Menominee tribe of Indians, through its business committee, is authorized to employ an attorney or attorneys to defend the interests of said tribe and of the individual members of said tribe in any actions brought under the provisions of this Act, the compensation of such attorney or attorneys to be determined by the court, and for which attorneys' fees judgment shall be rendered, and upon its certification to the Secretary of the Treasury the amount of said judgment shall be paid to said attorney or attorneys out of any

> funds standing to the credit of said Menominee tribe of Indians in the Treasury of the United States."

We have divided the section in paragraphs for the sake of convenience in studying its provisions. Similar jurisdiction was conferred on the Court of Claims in other logging claims against the Menominees by the following acts: Act of March 3, 1909, 35 Stat., 814; Act of April 4, 1910, 36 Stat., 287; Act of August 24, 1912, 37 Stat., 539.

## II.

## Right to Sue United States.

**Appellant had the right to make the United States a party defendant to this action.**

One ground of demurrer (R. 10), is that the jurisdictional act does not authorize the claimant to institute a suit against the United States.

1. It is true that the act does not in express terms, *totidem verbis*, direct the United States to be made a party, nor does it direct that the Menominee tribe shall be made a party, but the act would be fruitless of results if it did not grasp with certainty both the tribe and the government. If the United States cannot be sued there is no express authority for the conduct of the Attorney General in filing the demurrer and arguing the case. The whole theory of the act is that both may be sued.

2. One principal object of the act is to reach the funds of the tribe, or of the individual Indians, that are in possession of the United States as trustee, and com-

pel the payment therefrom of the judgments that may be rendered. The United States is treated by the act, as well as by the broad field of our general legislation, as the trustee in possession, or the vested trustee of the Indian funds. Therefore, it was clearly right and proper, and we submit that it was necessary to sue both the United States and the tribe. The case may be likened to a suit in equity to direct the disposition of a trust fund, the holder of the fund being a necessary or at least a proper party defendant. 1 Daniel's Chan. Prac., side pp. 246-249. "Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause." Equity Rule 37, Supreme Court U. S.

See also *La Albra Silver Mining Co. v. United States*, 175 U. S., 423, 441-443, 463-466, where white citizen claimants of the fund were made defendants by the jurisdictional act and the bill that was filed.

## III.

## Due Process of Law.

**Congress had power to confer jurisdiction on the Court of Claims to adjudicate this case, even if the Indians were and are citizens of the United States.**

One ground of demurrer (R. 10), is that the jurisdictional act was enacted by Congress in violation of the Fifth Amendment to the Constitution and conferred no jurisdiction on the Court of Claims to consider the subject matter of the petition. The opinion of the court below (R. 11-13) proceeds on that theory in part, hold-

ing that the Indians should have been sued in the Wisconsin courts.

1. The citizenship of the Indians, if they be citizens, does not divest the United States of its plenary power and jurisdiction over them, for they are still in a sense the wards of the Nation and are to be dealt with as such. The plenary power of the United States over the Indians and their property rests upon considerations that are not affected by the grant of citizenship. That plenary authority over the affairs and relations of the Indians has been exercised by Congress from the beginning. The power has always been deemed a political one, not subject to be controlled by the Judicial Department of the Government. The Indians are in a condition of tutelage or dependency and have not been discharged from that condition by acts of Congress conferring citizenship. The tribal property and its development still remain subject to the administrative control of the government, even though the members of the tribe have been invested with the status of citizenship by recent legislation. These propositions are settled now beyond controversy.

*Lone Wolf v. Hitchcock*, 187 U. S., 553, 565;
*Cherokee Nation v. Hitchcock*, 187 U. S., 294, 307, 308;
*United States v. Rickert*, 188 U. S., 432;
*United States v. Celestine*, 215 U. S., 278;
*Tiger v. Western Invest. Co.*, 221 U. S., 286, 310-316.

In the case last cited an act of Congress restricted the right of alienation by Indians who were citizens, and it was insisted at bar that, as they were citizens at the time of the conveyance and had full legal title to the premises, their rights could not be restricted by legisla-

tion of Congress. This court held the law to be otherwise.

In the case at bar there was no right of property which had been vested in the individual Indians by prior laws or contracts. On the contrary, the designated funds of the tribe sought to be reached are the tribal or community funds which have not yet been segregated or set apart to the individual Indians so as to become their separate property.

As between the Indians and the United States the funds in possession of the latter were in strict law the property of the United States, and the Indians could not assert or enforce any interest in them so long as the government legally withheld them from distribution.

*La Abra Silver Mining Co. v. United States*, 175 U. S. 423, 458.

In other words, this action is one against the tribe and the United States to enable the latter, as trustee, to pay the judgments rendered, if any, out of the tribal funds, the tribe and the trustee being made defendants, each being given its day in court with ample opportunity of defense. Not only was the United States served with notice of the pendency of the action, but so was the Menominee tribe through its tribal authorities. We make this statement professionally, as the record here does not show the service of notice.

2. The act expressly authorizes the tribe to employ attorneys to defend it and its individual members. December 22, 1908, a little more than six months after the petition was filed, the tribe filed an answer in six paragraphs going to the merits alone and not to the jurisdiction (R., 1). The answer is signed by attorneys for the

tribe. The amended petition was filed later on and "the defendants" demurred to it (R., 10). The tribe did not file a separate demurrer. We submit that the tribe by answering on the merits and not raising the question of jurisdiction, consented broadly to jurisdiction by the court below over the tribe and its individual members.

3. It has been common practice of the Congress to pass jurisdictional acts of the general character of the one here involved, such as 25 Stat., 1015, sec. 4; 26 Stat., 636, 851, 1021, sec. 12; 34 Stat., 1055. Many similar acts might be cited that have been considered by the Court of Claims and by this court without any doubt being expressed as to the power of Congress to enact such legislation. Among the cases of that kind are these:

*Blackfeather v. United States*, 28 C. Cls., 447, and 155 U. S., 180;
*Journeycake v. Cherokee Nation*, 28 C. Cls., 281, and 155 U. S., 196;
*Blackfeather v. United States*, 37 C. Cls., 233, and 190 U. S., 368;
*Delaware Indians v. Cherokee Nation*, 38 C. Cls., 234, and 193 U. S., 127;
*Sac and Fox Indians of Iowa v. Sac and Fox Indians of Oklahoma*, 45 C. Cls., 287, and 220 U. S., 481.

We submit that the question as to Indian citizens is now beyond controversy, and so is the question as to white citizen defendants.

*La Abra Silver Mining Co. v. United States*, 175 U. S., 423, 441-450, 455-466.

4. If it should be argued here, as it was in the court below, that there exists a remedy at law in the courts

of Wisconsin against the individual Indians, and that judgments may be obtained there which, if kept alive for a number of years, may be collected or enforced out of the lands and moneys of the Indians when restrictions against them are finally removed by act of Congress, we would answer that this theory negatives a great legislative policy of the national government because, when the Indians may be relieved of all restrictions and be thrown on their own resources, they will be met by judgments, with accumulated interest, which will be of sufficient amounts probably to absorb their allotments and property of all kinds, thus leaving them to begin their unfettered lives practically penniless. It is to be presumed that Congress had considered all these probabilities when it sent the parties to the court below for relief. If the claimants named in the act should be adjudged entitled to any of the Indian funds, it is the apparent intention of Congress that the judgments be settled now so the Indians may not only pay their just debts but may be relieved of obligations which would meet them at the moment of their full emancipation, thus negativing the great legislative policy which our government has been pursuing so many years. Surely these conditions justify Congress in this legislation and take it beyond the scope of the Fifth Amendment.

5. If it should be contended here, as it was in the court below, that this legislation deprives the individual Indian of the defense of the statute of limitations, we would answer *first*, that, in the acts we have cited in this brief, and in those acts considered by this court, as we have seen, jurisdiction was conferred without regard to the statute of limitations, and this court found no fault with those acts on that account or any other; and

we would answer further that here the Congress is authorizing the payment of the judgments out of funds in the Treasury of the United States and in no other way. If judgments were obtained in the state courts against the individual Indians, their property, upon the removal of all disabilities, would be subject to execution, and their horses, cattle, and other property would be levied upon and sold, leaving them in a dependent and deplorable condition, thus discouraging them at the very time when it is the legislative policy of the government to offer them every incentive to accumulate property and reach that state of independence which is one object of full emancipation. *Second*, as the government has undertaken this great work, in the meantime holding the funds in its possession, the Indians having no immediate property rights or liabilities therein, we submit that this act, though it waives or extends the statute of limitations, does not deprive the Indians of property without due process of law. No right of property is taken from the tribe or from the individual Indians by this act.

A statute of limitations relating to the collection of debts may be repealed, shortened, or lengthened without violating the Federal constitution. No man "can be said to have *property* in the bar of the statute as a defence to his promise to pay." (Italics ours.)

*Campbell v. Holt*, 115 U. S., 620, 628, 629.

6. If it should be argued here, as it was in the court below, that the jurisdictional act is unconstitutional because it divests the defendants of a jury trial and thus deprives them of their property without due process of law, we would answer that this action, like other actions in the

Court of Claims, is not covered by the Seventh Amendment.

*McElrath v. United States,* 102 U. S., 426, 439, 440.

"It is a mistaken idea that due process of law requires a plenary suit and a trial by jury in all cases where property or personal rights are involved."

*Ex parte Wall,* 107 U. S., 265, 289.

## IV.

## Authority of the Secretary of the Interior and Other Officers.

**Those officers have broad powers in dealing with Indian affairs.**

By Section 441, Rev. Stat., the Secretary of the Interior "is charged with the supervision of public business relating to the following subjects: . . . Third. The Indians."

Section 463, Rev. Stat., is as follows:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe have the management of all Indian affairs, and of all matters arising out of Indian relations.

Section 2058 is as follows:

> Each Indian agent shall, within his agency, manage and superintend the intercourse with the Indians, agreeably to law; and executee and per-

> form such regulations and duties, not inconsistent with law, as may be prescribed by the President, the Secretary of the Interior, the Commissioner of Indian Affairs, or the Superintendent of Indian Affairs.

Thus we show that the Secretary is charged with the supervision of the public business relating to the Indians; that the Commissioner has the management of all Indian affairs and all matters arising out of Indian relations, whilst the agent manages and superintends the intercourse with the Indians, agreeably to law, and executes and performs such regulations and duties, not inconsistent with law, as may be prescribed by his superiors. The language used in these enactments is broad and comprehensive and, in the absence of restrictions in the form of statutes or executive orders, the officials named had full power to deal with the subject covered by this action.

V.

## The Indian Trader Statutes.

**The statutes conferred on the traders the right to trade with the Indians.**

Section 2128, Rev. Stat., is as follows:

> Any loyal person, a citizen of the United States, of good moral character, shall be permitted to trade with any Indian tribe upon giving bond to the United States in the penal sum of not less than five nor more than ten thousand dollars, with at least two good sureties, to be approved by the superintendent of the district within which such person proposes to trade, or by the United States

> district judge or district attorney for the district in which the obligor resides, renewable each year, conditioned that such person will faithfully observe all laws and regulations made for the government of trade and intercourse with the Indian tribes, and in no respect violate the same.

Section 2129 authorized the Superintendent of Indian Affairs, or Indian Agent, or sub-agent, to license persons to trade with Indians, but that section was amended in effect or superseded by Section 5, Act of August 15, 1876 (19 Stat., 200) as follows:

> And hereafter the Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper, specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

Section 2131 is as follows:

> The superintendent of the district shall have power to revoke and cancel any license to trade within the Indian country whenever the person licensed has, in his opinion, transgressed any of the laws or regulations provided for the government of trade and intercourse with the Indian tribes, or whenever, in his opinion, it is improper to permit such person to remain in the Indian country. No trade with the tribes shall be carried on within their boundary, except at certain suitable and convenient places, to be designated from time to time by the superintendents, agents, and sub-agents and to be inserted in the license. The persons granting or revoking such licenses shall forthwith report the same to the Commissioner of Indian Affairs, for his approval or disapproval.

The office of Superintendent was abolished by the President under the authority vested in him by Section 6 of the Act of Feb. 14, 1873 (17 Stat., 463). See Senate Document Number 452, 57th Congress, 1st Session; "Indian Affairs," Volume I, p. 5, note. And the sole power to appoint traders was conferred upon the Commissioner of Indian Affairs by the Act of August 15, 1876, copied above. For other statutes regulating Indian traders, see sections 2132, 2133, 2136, Rev. Stat.

It will be noted that Section 2131 directs that no trade with the tribes shall be carried on within their boundary, except at certain suitable and convenient places to be designated from time to time by the agents and inserted in the license, and that the statutes we have copied clearly and broadly authorized the licensed traders to trade with the Indian tribes. The petition alleges, as we have shown in the statement of the case, that appellant and Stacy were duly licensed traders. The jurisdictional act puts that question beyond controversy, so far as appellant is concerned, by naming him as one of the eight "traders," and thus the Congress declared him to be a trader with the Menominee tribe.

## VI.

### Dead and Down Timber.

**The agreement sued on related to timber of that kind and was made lawfully.**

1. The jurisdictional act describes claims for supplies, etc., furnished "for the purpose of carrying on logging operations upon the Menominee Indian Reservation," and the petition describes those logging operations as be-

ing the cutting and selling of the dead and down timber (R., 3, 4, 8, 9). There was no authority of law for cutting and selling *standing timber* on an Indian Indian reservation and conduct of that kind would have been unlawful. *United States v. Cook*, 19 Wall., 591, 593, 594; *Northern Pac. R. R. Co. v. Lewis*, 162 U. S., 366. It has been and is a criminal offense to cut such standing timber. (25 Stat., 166). But in this case the timber was "dead and down." It was of no value to the reservation lands, and hence it could be dealt with under an agreement with the tribe.

(a) It was in recognition of all this that the Act of February 16, 1889 (25 Stat., 673) was passed. That act empowers the President, under such regulations as he may prescribe, to "authorize the Indians residing on reservations or allotments, the fee to which remains in the United States, to fell, cut, remove, sell, or otherwise dispose of the dead timber, *standing or fallen*, on such reservation or allotment for the sole benefit of such Indian or Indians." (Italics not in original.)

That act was passed in the middle of the last winter in which appellant and Stacy furnished supplies to the Indians for logging operations. Prior to that act the officials of the Indian Bureau had permitted dead and down timber to be cut and sold by the Indians for their benefit. This act is legislative recognition of the propriety of that conduct as to dead and down timber, and it gives the President the power to make regulations for such disposition thereafter of dead timber, *standing or fallen*, thus providing for a *uniform method* of dealing with the subject. It is apparent that such timber, if allowed to stand or lie upon the land, would simply rot and go to waste, and that its removal and sale were in

no sense injurious to the land or the government. Such disposition of the timber would give support to many Indians who had no other means of earning a living for themselves and families, and would swell the tribal funds, also to say nothing of putting the timber products into the channels of commerce.

During the period covered by the jurisdictional act the United States was appropriating money for the support and civilization of the Menominees. 21 Stat., 499; 22 *ib.*, 83, 446; 23 *ib.*, 90, 378; 24 *ib.*, 42, 462; 25 *ib.*, 231, 995.

(b) The condition of the Indians continued to be such thereafter that Congress, by the Act of June 12, 1890 (26 Stat., 146) empowered the Secretary of the Interior to authorize the Agent of the Menominee tribe to employ, at a reasonable compensation, Indians "to cut *all or any portion* of the timber on the lands reserved for the use of said Indians" into logs and haul them to the banks of the river, where they were to be sold to the highest bidder for cash for the benefit of the Indians doing the work, provided that not exceeding twenty millions feet of timber should be logged and sold in any one year. (Italics not in original.) The sum of $75,000 was appropriated, out of any money in the Treasury not otherwise appropriated, for the payment of the expenses, which were to be re-imbursed to the Treasury from the first proceeds of the sale of timber. It was further enacted that, after the first year's logging and annually thereafter, the Secretary of the Treasury was authorized to advance a like amount, out of any money in the Treasury belonging to the Indians, for the purpose of enabling them to carry on logging as provided in the act.

The Act of June 28, 1906, 34 Stat., 547, authorized the

Secretary to permit the business committee of the Menominee tribe to cause to be cut into logs and hauled to suitable places for sawing, the dead and down timber on a tract specifically described but in the reservation, which cutting was to be in addition to the amount authorized by the Act of June 12, 1890. The proceeds were to be disposed of according to the provisions of the act last named.

The Act of March 28, 1908 (35 Stat., 51) authorized the Secretary to cause to be cut and manufactured into lumber the dead and down timber, and such fully matured and ripened green timber as should be designated by the Forestry Service, upon the Menominee Reservation, and he was authorized to cause to be built, equipped, and operated suitable saw mills, and give employment to none but Indians on the reservation, so far as practicable. The Act of March 3, 1911 (36 Stat., 1076) enlarged the powers of the Secretary under the Act of March 28, 1908.

We have gone into this subject of "dead and down timber" for the purpose of showing that "traders" and the Menominee tribe through the Indian Agent, had the legal right to enter into and perform the agreement for the cutting and hauling of that dead and down timber. The agreement was made lawfully and it was kept faithfully by all parties to it, *including the payment of the moneys due appellant and Stacy until in the year 1889*, when the payments ceased, although the supplies were furnished as had been agreed.

The acts above cited are not in denial or restriction of the power that had been exercised by the government officials in making the agreements described in the petition, but they are acts conferring enlarged powers on the officials and the tribe so that the dead timber "standing or fallen," and "all or any portion of the timber on the

lands reserved for the use" of the Menominee Indians, and the designated "matured and ripened green timber," might be cut, sold, or turned into lumber and sold.

2. It is apparent that the conduct of the officers of the government, as described in the petition, and the nature of the congressional legislation that we have cited, are in fulfillment of the obligations of the treaty of February 8, 1831 (7 Stat., 342-346), with the Menominees. The fourth article of that treaty sets apart to the Indians "for their future homes, upon which their improvements as an agricultural people are to be made" the tract we know as the Menominee reservation, "the above reservation being made to the Menominee Indians for the purpose of weaning them from their wandering habits, by attaching them to comfortable homes," . . . The treaty obligates the United States to teach the Indians farming, assist them in the cultivation of their farms, and "instruct their children in the business and occupation of farming." The women were to be instructed "in the business of useful housewifery." Houses were to be erected on the reservation for the occupancy of the Indians and they were to be furnished with household articles farming utensils, and live stock. Grist and saw mills were to be erected and young men of the tribe were to be "instructed in the trade of a miller." In a word, the Indians were to be taught the arts and life of civilization.

We submit that, as an incident to all this, as well as a part of the legislative policy of the United States in recent years to teach industry and thrift to the Indians, it was both wise and lawful for the government officials, the traders, and the tribe to make the agreement sued on here.

The Senate Committee on Indian Affairs in reporting

favorably on the bill that became the Act of March 28, 1908 (35 Stat., 51), said: "The avowed object of all legislation pertaining to Indian affairs in the past half century has been to prepare and qualify the Indian for citizenship and the management of his own business. Because of his incapacity to manage his own property the Government has treated the Indian as a ward and has maintained guardianship over him." Senate Report, No. 110, 60th Cong., 1st Sess., p. 1.

## VII.

### Sufficiency of Petition.

**The petition alleges facts sufficient to constitute a cause of action.**

One ground of demurrer is that the petition does not state facts sufficient.

In parts IV, V, VI of this brief we have endeavored to show that the designated officials of the United States had power to deal with and manage the affairs of these Indians, to permit traders to engage in trade with them, and to give official assent to agreements made between the traders and the Indians for the cutting and disposal of dead and down timber.

The government was not simply discharging a duty imposed upon it by reason of the fact that it held lands and moneys for the Indians, but it was charged also with the duty of carrying out a great and wise legislative policy looking to the financial and industrial independence of the Indians. The government was engaged in teaching these primitive people the benefits and habits of civilized life. The purpose was to place them upon a plane where they

would be able to compete with their white brethren in the arts, industries, and advantages of civilized life. This was the obligation of the treaty of February 8, 1831 (7 Stat., 342, 346), as well as of frequent Congressional legislation—an object that has been stated with great force in the opinions of this court and in Congressional reports about these claims (H. Rep. No. 4430, 59th Cong., 1st Sess.; H. Rep. No. 1326, 60th Cong., 1st Sess.; S. Rep. No. 279, 60th Cong., 1st Sess.) Pursuing that policy, and acting under the general authority vested in them by the acts of Congress that we have considered in this argument, the officials of the United States, about the first of December, 1881 (R. 4), approved of an agreement that the Indians entered into with Wescott, a trader, which enabled them to cut and sell the dead and down timber on their reservation, the trader furnishing them with supplies and receiving pay therefor. When the term of that trader ended and he was succeeded by appellant and Stacy, a similar arrangement or agreement was entered into between them and the tribe, to the approval of the government officials, pursuant to which the traders furnished the Indians with supplies until in the year 1889 the supplies being paid for promptly with a few exceptions until then. It follows that the action is on an agreement performed by appellant, whether the agreement was within the forms of law or not.

We now submit the following propositions of law:

1. There was here an agreement entered into and most of the payments made. Those payments operated as a ratification.

In *Neal's case*, 14 C. Cls., 280, 285, the Superintendent of Indian Affairs at Lawrence, Kansas, entered into a contract with Neal for wagon transportation and for-

warded it to the Commissioner of Indian Affairs. There was some telegraphic correspondence, leaving it doubtful whether the contract was approved or not. Controversies arose and Neal brought action in the Court of Claims for gains prevented. The court, after showing that the government had made payments to claimant for damages sustained by reason of failure to furnish freight in the full amount of the contract, held (p. 285) that the payments amounted to a complete ratification of the original contract.

2. If there be no agreement made within the forms of law, the action lies upon an implied contract for a *quantum valebant* "for supplies, goods, wares, merchandise, tools, and livestock furnished certain members of the said tribe after the first day of January in the year 1880, for the purpose of carrying on logging operations upon the Menominee Indian Reservation." The Indians received and used the property of appellant, and he is entitled to be reimbursed the value thereof, whether there was a formal and precise agreement in writing or not.

In *Clark v. United States*, 95 U. S., 539, there was an oral agreement with Major Potter, an officer in the Quartermaster's Department, with the approval of General Steele, commanding the Western Division of Texas, for the use or service of a vessel. The Act of June 2, 1862 (12 Stat., 411), now Sec. 3744, Rev. Stat., required such contracts to be reduced to writing, signed by the parties with their names at the end thereof, and filed in the Returns Office" of the Interior Department. This court held (p. 542) that the statute prohibited any other mode of making contracts, and then it said:

> We do not mean to say that, where a parol contract has been wholly or partially executed and

> performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be entitled to recover such value as upon an implied contract for a *quantum meruit*.

The same effect is *Roberts v. United States*, 92 U. S., 41, 48, for services rendered without a formal contract being made.

In this connection *Braden's case*, 16 C. Cls., 389, 410, 412, is interesting. There Judge Nott, after a full review of the authorities, laid down the rule (p. 410) that where a claimant rendered work and service at the solicitation of the agents of the government, but without due authority on their part, it must be inferred from the act referring the case to the Court of Claims for determination "that the legislative purpose was to ratify the transaction so far as to enable the claimant to recover for services rendered *in quantum meruit*, or for goods furnished *in quantum valebant*." And on page 412 Judge Nott said: "When a man accepts the services of another, or receives his goods, he is ordinarily in equity and good conscience bound to pay for them, and the law imparts from the transaction an implied contract, and upon principles of equity and justice awards to the plaintiff compensation for his services *in quantum meruit* and for his goods *in quantum valebant*." In that case a judgment was rendered for $12,606 and no appeal was taken.

3. The provisions of the jurisdictional act operate as an assumption of liability if the value of the claims be established by the evidence and they be unpaid.

> *Navarre's case*, 33 C. Cls., 235, 248, 249-251;
> *Affirmed generally*, 173 U. S., 77.

4. If Congress, having knowledge of the facts, had intended that the validity of the agreement should be contested, or that it should be treated as a nullity, the claims would not have been referred to the court below to have such a defense set up and the claims defeated. Congress could have done all that itself by not making the reference.

*Dahlgren's Case,* 16 C. Cls., 30, 49, 50.

In *Braden's Case,* 16 C. Cls., 389, 411, Judge Nott said that the defect in the claimant's case,—the want of authority in the Superintendent who required the better kind of masonry to be built,—was apparent on the face of the contract; that these provisions of the contract were quoted and clearly brought to the attenion of Congress in the Committee report on which the claim was considered; and that all of the material facts since substantiated by evidence were set forth in that report. The court then held that, taking the act in connection with those primary facts, it was clear that "the purpose of Congress was that the act referring the claim should also operate upon the cause of action," citing *Roberts v. United States,* 92 U. S., 41. In that case this court said (p. 49):

> It is true that Congress did not determine, in express terms, that the parties were entitled to any compensation, but referred it to the court to decide "whether any, and, if any, what amount is due." Still we think it is plain that Congress principally intended to refer to the adjudication of the Court of Claims the amount of compensation to which the claimants were entitled, and for that purpose prescribed the principle by which it should be estimated; but even if it was intended

> to refer the whole subject, the right to compensation, as well as the amount, the claimants, under the circumstances of the case, are, in our judgment, entitled to compensation.

But we are not left in doubt as to the purpose of Congress when we look to the act itself or to the committee reports which led to its passage. This act was passed in the 60th Congress, 1st Session, and the bill was S. 4791. In making favorable report (No. 279) on the bill the Senate Committee on Indian Affairs (p. 1) said:

> The bill refers to the Court of Claims the claims of traders who furnished supplies to Indians of the Menominee tribe for the conduct of logging operations during the year 1880 and years subsequent thereto. It is claimed by the traders that there is still outstanding an indebtedness due and unpaid. The traders claim that this indebtedness should be paid out of the funds of the Menominee tribe. The business committee of the tribe denies any tribal liability for these supplies, contending that they were furnished not to the tribe, but to individuals, and that the liability, if any, is individual.

The committee copied the report of the Indian agent at Keshena, in which he sets forth the understanding with Westcott, substantially as pleaded in this petition, and then the Committee said (p. 3):

> Your Committee is satisfied that it would be impracticable for the Committee to attempt to determine whether the liability incurred is tribal or individual. If tribal it should be paid from the funds of the Menominee tribe; if individual from the funds which may be credited to the individual

> members of said tribe. The bill refers these claims to the Court of Claims to determine whether the liability be tribal or individual, and in either case to render final judgment. . . . It appears to your Committee that the bill will do no more than to provide a means for the equitable settlement of these claims which have been pending in the Department of the Interior since 1885.

The bill passed the Senate and went to the House, where the Committee on Indian Affairs (Report No. 1326) recommended the passage of the bill, and incorporated a letter from the Commissioner of Indian Affairs favoring its passage. The committee also incorporated House Report No. 4430, 59th Congress, 1st Session, on these claims. In that report it is said:

> The traders, in the course of their legitimate transactions with the said Menominee Indians at various times, as shown by the itemized accounts hereto attached and made a part hereof, by reference, had sold goods, wares, and merchandise to Indians living on said reservation, for which they have not been paid; that credit was given to said Indians for the purpose of furnishing such of them as had contracted for logging work for the benefit of the whole tribe with supplies for their use and maintenance in their logging camps and similar employment under said contract. . . . It appears from the evidence submitted to us that these logging operations were for the benefit of the whole tribe, and that, having been duly authorized to cut and sell the "dead and down" timber, it was necessary that they should be supplied and supported at the expense of the tribe, inasmuch as the entire net profits of these operations aggregate a fund for the benefit of the tribe;" . . .

The Committee incorporated, also, the report of the Indian agent at Keshena made to the Commissioner of Indian Affairs.

We submit that these committee reports make it apparent that the purpose of Congress was to treat the agreements with the Indians as lawful and valid, declare that the traders had performed their contracts with the Indians, and then vest in this court power to adjudicate amount of "any balances found due" and "in rendering judgment, ascertain and determine the amount, if any, due upon each of said claims," to use the language of the jurisdictional act. All this being done, the Court of Claims was to "then determine if such liability" be that of the Menominee tribe as a tribe or that of its individual members. All other questions were before the committees and the two Houses of Congress and were decided in favor of the traders.

## VIII.

### Section 2103, Revised Statutes.

**That section does not apply to the contract in the case at bar.**

1. The opinion of the court below alludes to Sec. 2103, Rev. Stat., and therefore we point out that it is of general character, requiring that agreements with Indians to be valid shall be in writing, be executed before a judge of a court of record, and be approved by the Secretary of the Interior and the Commissioner of Indian Affairs, to say nothing more of its many provisions. At the end of this long section it is enacted that all contracts and

agreements made in violation of it shall be null and void. This is a statute of frauds.

That section is not applicable to an agreement entered into by these Indians, through the officials of the United States in charge of the affairs and relations of the Indians, with Indian traders, and relating to their mutual business affairs. Such affairs and agreements are not within the objects and purview of section 2103, for they are predicated upon the statutes we have quoted in the earlier parts of this brief, relating to the immediate and intimate conduct of the Department officials toward the Indians, as tribes or as individuals, and the licensed traders, and involving the parental and protective authority of the United States. Those statutes, as distinguished from section 2103, are special or particular, while that section is general and designed to prevent the Indians from engaging in business transactions with the world at large.

The rule is well settled that special and general statutory provisions may subsist together, the former qualifying and supplying exceptions to the latter.

*Townsend v. Little*, 109 U. S., 504, 512;
*United States v. Nix*, 189 U. S., 199, 205.

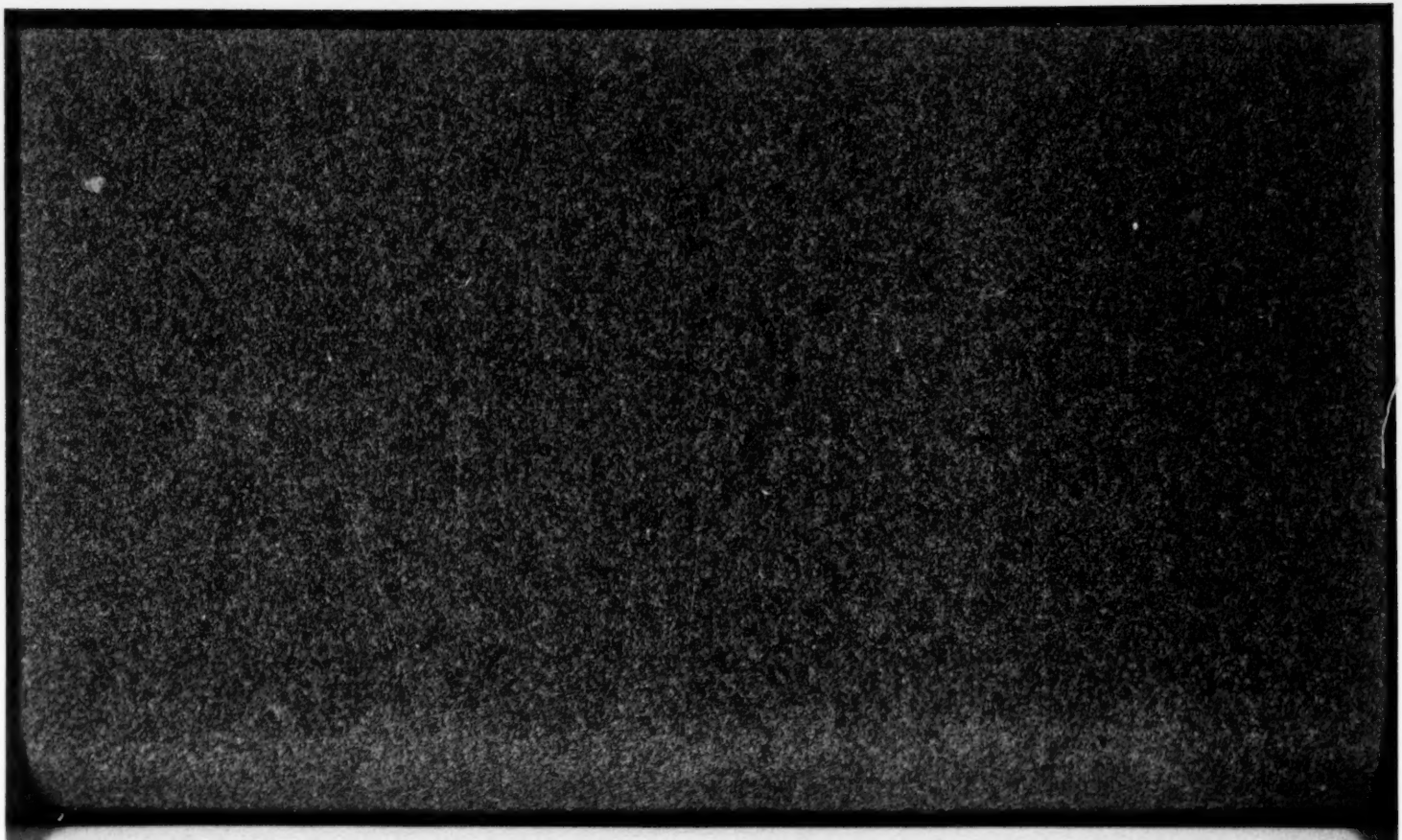
We submit that it would take particular and inclusive language to make section 2103 require Indians, Indian traders, and the officials of the United States in their dealings with and care over the Indians, to comply with the requirements of that section. There is no such language in the section. It seems apparent that Congress did not use language of that character in that section for the reason that the legal relationship between the traders, the government, and the Indians was at variance utterly

with the evil sought to be destroyed by the enactment of that section.

2. We submit that the Congress declared and enacted in the jurisdictional act that appellant was one of eight "traders" to whom "balances" might be "found due" * * * "for supplies, goods, wares," etc., furnished by them, thus taking appellant out of the provisions of section 2103, for the jurisdictional act recognizes the validity of the agreement upon which the supplies were furnished.

We respectfully submit that the judgment of the court below should be reversed as to all of the defendants.

L. T. MICHENER,
P. G. MICHENER,
C. F. DILLETT,
*Attys. for Appellant.*



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# In the Supreme Court of the United States

OCTOBER TERM, 1913.

F. F. GREEN, APPELLANT,
*v.*
THE MENOMINEE TRIBE OF INDIANS IN Wisconsin and The United States. } No. 285.

*APPEAL FROM THE COURT OF CLAIMS.*

## BRIEF FOR THE UNITED STATES.

### STATEMENT.

This case involves the claim of appellant for supplies and equipment furnished to certain members of the Menominee Tribe of Indians in Wisconsin, upon an oral agreement alleged to have been entered into between appellant and one W. H. Stacy, parties of the first part, and the Menominee Tribe of Indians, through its "head men" and the United States Indian agent, parties of the second part.

The proceeding was brought in the court below under the pretended authority of a special act of Congress, approved May 29, 1908. (35 Stats. L., 444.) That part of the act pertinent to the issues in this

case will be found printed in the appellant's brief, pages 7 to 10.

An original petition was filed in the Court of Claims (Appendix A, p. 22), to which a demurrer was interposed (Appendix B, p. 32). The demurrer was sustained in part and overruled in part with leave to amend. (46 C. Cls., 68.) The appellant amended his petition (R., pp. 3–10; Appendix C, p. 33), to which demurrer was also made by the defendants on the following grounds: (*a*) That the jurisdictional act did not authorize the claimant to institute a suit against the United States; (*b*) that in the amended petition the claimant has attempted to set up a new cause of action by making the tribe a principal instead of a guarantor of the debts of the individual Indians to whom the supplies are alleged to have been furnished; (*c*) that the jurisdictional act is in violation of the fifth amendment to the Constitution, and consequently conferred no jurisdiction upon the Court of Claims to consider the subject matter of the petition; and (*d*) that the amended petition did not allege facts sufficient to constitute a cause of action.

The court sustained the demurrer as to the first and last grounds stated therein and thereupon dismissed the petition without deciding the issues raised by the second and third grounds. (R., pp. 10 and 11.)

Appellant assigns error on the ground that the Court of Claims erred in sustaining the demurrer and in dismissing the petition. (R., p. 7.)

The defendants contend that the demurrer was properly sustained upon the two points stated in the opinion of the court and, furthermore, that it might have been sustained upon either one or both of the other grounds stated.

## ARGUMENT.

### Questions of law involved.

1. Whether or not the appellant in his amended petition has set up a new and different agreement, thereby in effect stating a new case.

2. Whether the United States have properly been made parties by the Court of Claims.

3. Whether Congress had power to confer jurisdiction upon the Court of Claims to adjudicate claims against individual Indian residents of the State of Wisconsin growing out of their store accounts with the appellant and the said Stacy.

4. Whether there is a liability against the Menominee Tribe for supplies furnished to individual members of said tribe, or to companies, crews, or squads of such Indians engaged in logging operations, on an oral agreement of the headmen and chiefs that such supplies should be paid for by the Indian agent out of the first proceeds of the sale of logs.

5. Whether the tribe or the individual members thereof are responsible for the failure of the Indian agent to apply the proceeds of the sale of such logs in accordance with the terms of the alleged agreement.

I.

**Appellant has attempted to set up a new and different agreement in his amended petition.**

The original petition alleges that:

> In order that the Indians might be relieved of their difficulties and their urgent necessities be provided for, it was agreed by the Indian agent and the headmen of the tribe that if petitioner and W. H. Stacy would extend credit to the companies, crews, or squads of Indians that should be formed for the purpose of carrying on logging operations, and also extend a limited amount to their respective families * * * the Menominee Tribe of Indians would *indemnify* petitioner and said Stacy and *assure the payment to them of all supplies so to be furnished by them;* * * * (Italics ours.)

The amended petition drops the allegation that the tribe was guarantor and attempts, we think vainly, to charge it with liability as principal.

After reciting the incidents which brought the parties into the contractual relationship and setting forth the method of payment substantially as in the original petition, it is alleged:

> That said agreement was made with your petitioner and W. H. Stacy, personally, and on behalf of the Menominee Tribe by the chiefs and head men thereof, which said chiefs and head men still continued to have and were recognized as having authority to make contracts in behalf of and binding on said tribe. That

said last-mentioned agreement was approved by the Indian agent at Keshena, Wisconsin, and was acquiesced in by all members of said tribe and treated by all parties interested as valid and binding on the contracting parties. That your petitioner and the said W. H. Stacy furnished the equipment and supplies for which judgment is claimed in this action, in accordance with and relying upon said agreement, and *did not* and *would not extend* credit to the *individual members of said tribe*, but *extended* such credit *solely to the tribe*, relying upon said agreement. (Italics ours.)

There are numerous allegations in the amended petition inconsistent with the above-quoted allegation, but taking it at its face value and comparing it with the allegations of the original petition it becomes clear that appellant has violated one of the elemental rules of pleading by alleging an entirely different cause of action from that stated or attempted to be stated in the original petition.

Wherefore the demurrer should have been sustained on the second ground stated therein.

## II.

**Whether the United States have been properly made parties defendant.**

We have no disposition to deny that the relation of guardian and ward exists, and has existed for many years, between the Government and the Menominee Tribe of Indians, but we do deny the authority of the Government as guardian of such Indians

to *waive or prejudice* any of the constitutional rights, privileges, or immunities of its Indian wards. (Am. and Eng. Ency. of L., 2 ed., vol. 15, pp. 11 and 12, and cases cited.) The duty which the Government owes to its Indian wards is that of *protection*. (*United States* v. *Kagama*, 118 U. S., 375.)

Judge Shiras in delivering the opinion of the court in *United States* v. *Flournoy* (69 Fed. R., 891) compared the guardianship of the Government over tribal Indians to that of a State over its infants, and the same analogy was drawn by Judge Morris in *Hitchcock* v. *United States, ex rel. Big Boy* (22 Apps. D. C., 275); and Chief Justice Peelle of the Court of Claims, in speaking of two acts of Congress restricting the alienation of the lands of full-blood Cherokees (*Brown* v. *United States*, 44 C. Cls., 283, 311), said:

> They are analogous to the protection afforded by the States to the property of infants and others incompetent from any cause to manage their own affairs, though they be citizens of the United States.

This court in *Tiger* v. *The Western Investment Company* (221 U. S., 286, 315, 316) drew a like analogy upon the strength of the decision in the *Slaughter-House cases* (16 Wall., 36, 76).

All claims against Indian tribes which have heretofore been referred by Congress to the Court of Claims and considered by this court on appeal have arisen out of the construction by the executive departments of treaties and acts of Congress dealing with tribal property, and in every such case the

special acts conferring jurisdiction have in terms authorized the claimants to make the United States and the tribe against whom the claim was made parties defendant to the suit.

The facts in this case are very different from any of these. Here supplies were furnished to Indians who were authorized by the Government to make their own bargains and sales under the supervision of the Indian agent. The chiefs and head men of the tribe, who appear to have acted without authority, agreed only that the supplies should be paid for by the agent out of the proceeds of the first sale of logs, which, according to the amended petition, the agent failed to do.

Under the special act conferring jurisdiction in this case the court is first to judicially determine whether "there is a liability upon any of said claims," and, second, whether the liability, if any, "be that of the said Menominee tribe of Indians as a tribe or that of individual members of said tribe." If upon the tribe, judgment should be rendered against the tribe; and if upon the individuals, judgments should be rendered against the individuals. There was no authority given by the act to make the United States parties to the suit, and there is nothing in the general jurisdiction of the court which warranted the court in doing so.

For the reasons stated the demurrer was properly sustained as to the first ground alleged therein.

## III.

**Whether Congress has power to refer controversies between residents of the same State to the Court of Claims.**

The Court of Claims in its first decision (46 C. Cls., 68) overruled the demurrer to the original petition as to the individual Indians, but sustained it as to the tribe, for the reason that the allegations of the petition set up a dual obligation, one by the individuals and one by the tribe as a naked guarantor which could be enforced by suit against the individual or the tribe, or both, and should therefore have been in writing. The court at the same time expressed a doubt as to the authority of the head men to bind the tribe, and whether, in view of sections 2103–2106 of the Revised Statutes, the agreement would have been valid if it had been in writing.

The court evidently felt a strong doubt as to the validity of the claims against the individual Indians, but in view of the fact that Congress had frequently settled claims of traders against the individual Indians, it did not feel inclined to deny the jurisdiction of Congress in such claims. The court evidently overlooked the fact that Congress being in doubt as to the legality of such procedure hesitated to pay such claims, and for that reason referred them to the Court of Claims to determine whether *any* liability existed and, if so, whether it was a tribal or individual liability.

In sustaining the demurrer to the amended petition, Judge Barney, who delivered the opinion of the Court of Claims (Rec., p. 13), said:

> It will be observed that the provisions of section 2103 of the Revised Statutes referred to apply only to those Indians who were "not citizens of the United States." *It follows that if they were citizens of the United States at the time of the alleged agreement the courts of Wisconsin had jurisdiction to adjudicate such claims, whether such contract be treated as express or implied.* (*Stacy* v. *La Belle*, 99 Wis., 524; *Ingraham* v. *Ward*, 56 Kans., 550, and cases there cited.) If they were not citizens of the United States, then the agreement so made can not be enforced in this court, as the same was not reduced to writing with the approval of the Secretary of the Interior as provided by statute. (Italics ours.)

The cases cited by the court show that noncitizen Indians are doubly protected, first, against liability by section 2103 of the Revised Statutes; and, secondly, against the jurisdiction of the Court of Claims by that provision of the fifth amendment to the Constitution, which declares that "no person shall be deprived of life, liberty, or property without due process of law," language broad enough to cover all residents of a State irrespective of race, color, or political standing.

This court, in *Murray's Lessee* v. *Hoboken Land Improvement Company* (18 How. 272, 276), said:

> The words "due process of law" were undoubtedly intended to convey the same meaning as the words "by the law of the land," in

> Magna Charta. * * * The article is a restraint on the legislative, as well as on the executive and judicial powers of the Government, and can not be so construed as to leave Congress free to make any process "due process of law" by its mere will.

This court, in the *Bank of Columbia* v. *Okely* (4 Wheat., 234, 244), said that this provision of the Constitution was "intended to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice." (Page 242.)

"The law of the land" is therefore the established common and statute law of the State, which affords to every resident equal protection in life, liberty, and property, and any attempt by Congress to withdraw from its protection an individual or class of its residents would be in violation of the fifth amendment and therefore void. That is precisely what the jurisdictional act in question here proposes to do. It attempts to invest the Court of Claims with jurisdiction to settle the controversies between residents of the State of Wisconsin. In doing so it also deprives said residents of the right of trial by jury, guaranteed them by the seventh amendment to the Constitution of the United States.

Concerning this amendment Judge Cooley, in his Principles of Constitutional Law, third edition, pages 266, 267, says:

> The seventh amendment applies not only to cases tried by jury in the Federal courts but

> also to such as are tried by jury in the State courts and afterwards removed to the Federal Supreme Court for review under its appellate jurisdiction.

This court in *Justices* v. *Murray* (9 Wall., 274–282) said that an act of Congress which provided for the removal of the judgment in a case which had been tried by jury in a State court to a United States Circuit Court for a retrial on the facts and law was in violation of the seventh amendment to the Constitution, and therefore void.

This court has said that the right to a trial by jury may be waived (*Schick* v. *U. S.*, 195 U. S., 71, 72), but it has never said that it may be arbitrarily taken away without the consent of the defendants, who in this case are not even represented by attorneys of their own choice.

In the case of *McElrath* v. *United States* (102 U. S., 426, 439, 440) cited by the appellant, this court said that the Government only allowed itself to be sued on its own terms, one of which was that in the Court of Claims cases should be tried without jury; therefore, if a claimant voluntarily brought suit in that court he could not avoid the consequences of his act by pleading the seventh amendment to the Constitution. The inference is clear that if he had been forced into court against his will it would have been otherwise.

Another case cited by appellant, *ex parte* Wall (107 U. S., 265, 289), has no application to the instant case. There an attorney was disbarred from practice for conduct constituting a criminal offense for

which he might have been indicted, tried, and convicted if the charge had been sustained. A petition was filed in this court for a writ of mandamus to compel the judge to restore him to practice. It was contended at the trial that his disbarment was a taking of personal rights without due process of law, as the judge should not have taken such action in the absence of his indictment, trial, and conviction by jury. The court said that it was a mistaken idea that due process of law always required trial by jury in all cases involving property or personal rights and mentioned a number of cases where it was unnecessary, none of which, however, even remotely applies to this.

**Congress has no power to waive the statute of limitations in this case.**

The general rule that the statute of limitations must be pleaded as a defense does not apply to suits in the Court of Claims against the United States, where it is the duty of the court, when it appears that the claim is barred, to dismiss the petition of its own motion, although the statute may not have been pleaded. (*Finn* v. *United States*, 123 U. S., 227.)

It is, however, unquestionably within the power of Congress to waive the statute of limitations in claims against the Government—a power which has been frequently exercised. Congress, however, has no such power and its acts are *ultra vires* when it attempts to extend the period of limitations to include the claims of individual inhabitants of a State where the right

of action against them has expired by lapse of time. (*Palariet's Appeal*, 67 Pa., 479.)

Judge Cooley in his work on Principles of Constitutional Law, first edition, page 328, says:

> When the time limited by the statute has been suffered to lapse without suit, so that the right of action is gone, it is not competent to remove it by retrospective legislation, since this would be equivalent to creating a new demand.

The United States standing in the relation of a guardian has no authority to waive any of the benefits to which its ward—the Indians—may be entitled (*Forbes* v. *Mitchell*, 1 J. J. Marsh, 440, 441), and any judgment rendered in pursuance of such waiver is erroneous (*Hite* v. *Hite*, 2 Rand., Va., 409, 417); nor has it any authority to revive against its ward, a debt which has been barred by the statute of limitations (*Clement* v. *Sigur*, 29 La., An., 798, 802); nor to release any security belonging to its ward (*Water Valley* v. *Seamen*, 53 Miss., 655, 660).

**Service of notice necessary in order to give the court jurisdiction of the persons of defendants.**

The jurisdictional act has made no provision whatever for service or notice of any kind upon the defendants in this suit. The act, however, has provided that the business committee of the tribe shall employ attorneys to represent both the tribe and the individual members thereof, the result of which has been that no attorneys have been employed by the

defendants, who are authorized to waive by their appearance the necessity for notice.

Whenever a suit has been brought in any court against private parties, it becomes necessary that notice of such suit shall be served on the defendants in order to give the court jurisdiction of their persons, and such jurisdiction will date from the service of the summons. (*Woodford* v. *Baker*, 10 Oreg., 491–494.)

**The property rights of individual Menominee Indians are protected by the State laws of Wisconsin.**

At the time the supplies were furnished to the members of the Menominee tribe, the appellant and the defendant Indians were residents of the State of Wisconsin and continue to remain such residents. The constitution of Wisconsin provides that:

> Any suitor in any court of this State shall have the right to prosecute or defend his suit either in his own person or by an attorney or agent of his choice. (Art. 7, sec. 20.)

The constitution of Wisconsin also declares that:

> The right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law. (Art. 1, sec. 5.)

The statute law of Wisconsin provides that:

> A civil action in a court of record shall be commenced by service of a summons. From the time of such service or the issuance of a provisional remedy the court shall be deemed

> to have acquired jurisdiction and to have control of all subsequent proceedings. (Wis. Stat., sec. 2629.)

Section 2630 provides what the summons shall contain.

The laws of Wisconsin also provide that no action shall be brought upon any contract not under seal after the lapse of six years (Wis. Stat., sec. 4222), and no action shall be brought upon any open account after the lapse of one year from the date of the last item proved (Wis. Stat., sec. 4225).

In a suit brought by Stacy, the alleged partner of the appellant, on an implied contract for goods furnished to a Menominee Indian, in which no mention was made of the appellant or his alleged agreement, the Supreme Court of Wisconsin squarely recognized the right of members of the Menominee tribe to sue and be sued in the State courts of Wisconsin (*Stacy* v. *La Belle*, 99 Wis., 520, 524), where the court said:

> Counsel has not cited any Federal statute or treaty which prohibits State courts from taking jurisdiction of an action on contract against an Indian, as in the case at bar, and we find none. The plaintiff Stacy was not an Indian agent, but he was licensed and expressly authorized to sell goods to Indians as an Indian trader. (R. S. of U. S., secs. 2128–2132.) The goods for which this action was brought were therefore properly sold to the defendant. In the absence of any Federal statute or treaty to the contrary, and upon the principles stated, we

must hold that a State court may take jurisdiction of an action on contract in favor of a white man and against an Indian belonging to a tribe and a particular reservation. (*Stokes* v. *Rodman*, 5 R. I., 405; *Swartzel* v. *Rogers*, 3 Kans., 374; *Ingraham* v. *Ward*, 56 Kans., 550; *Godfroy* v. *Scott*, 70 Ind., 259; *Ke-tuc-c-mun-guah* v. *McClure*, 7 L. R. A., 782; 122 Ind., 541; *Gho* v. *Julles*, 1 Wash. Ter. (N. S.), 325.) In one of these cases it was held that "the fact that the lands of the defendant, who is an Indian, are not liable to levy and sale under a judgment, is no ground for refusing a judgment against him." (7 L. R. A., 782.)

**Individual tribal Indians have the right to sue and be sued in the courts of States where they reside.**

This court has recognized tribal Indians as being *persons* within the meaning of the fifth amendment to the Constitution, which declares that "No person shall be deprived of life, liberty, or property without due process of law," when it said in *Felix* v. *Patrick* (145 U. S., 317, 332): "It is scarcely necessary to say in this connection that while until this time they were not citizens of the United States, capable of suing as such in the Federal courts, the courts of Nebraska were open to them as they are to all persons, irrespective of race or color. (*Swartzel* v. *Rogers*, 3 Kans., 374; *Blue Jacket* v. *Johnson County*, 3 Kans., 299; *Wiley* v. *Keokuk*, 6 Kans., 94.)"

In the case of *Jack Gho* (a Chinaman) v. *Charley Julles*, a tribal Indian (1 Wash. Ter., 325–329), for services as cook in his logging camp, the court took

jurisdiction and rendered judgment against the Indian.

In the case of *Godfroy* v. *Scott et al.* (70 Ind., 259) an attachment suit against a nonresident Miami Indian entitled to an annuity from the United States in which the defendant had verbally directed the Indian agent to pay his annuity to the garnishee, in part satisfaction of a debt, and the payment had been made, the court took jurisdiction of the suit and held that the verbal order upon the agent was valid.

In *Swartzel et al.* v. *Rogers* (3 Kans., 374) brought for the partition of inherited lands which had been patented to a Shawnee ancestor, the court said (p. 377): "The fact that the contestants are Shawnee Indians did not deprive the district court, nor does it forbid to this court, the exercise of jurisdiction either as to parties or subject matter."

In the case of *Rubideaux* v. *Vallie* (12 Kans., 28, 32), brought for the recovery of the purchase money of a piece of land against a tribal Indian, the court took jurisdiction and rendered judgment against the Indian.

In the case of *Ke-tuc-e-mun-guah* v. *McClure* (122 Ind., 541) suit had been brought upon a promissory note and the defense made that a tribal Indian could not be sued in respect to his allotted lands which were protected from levy and sale. The court said that the defense was not sufficient as the debt might be collected without resort to the land.

In the case of *Ingraham et al.* v. *Ward et al.* (56 Kans., 550) an attempt was made to set aside a

division of lands inherited from allottees. The court said (p. 555) that: "The State courts were open to the Indians for the division of their property, and their right to resort to these tribunals for adjustment of their rights has been frequently recognized." (See also the case of *Hunt* v. *State*, 4 Kans., 64.)

In *La Abra Silver Mining Company* v. *United States* (175 U. S., 423), cited by appellant, this court was careful to call attention to the fact that all the negotiations relating to the claim had been carried on between the United States and Mexico and that the award belonged to the United States. Therefore the suit instituted in the Court of Claims against the company was in effect a suit against the United States to determine whether the said company was entitled to the award or any part thereof, and the Government could impose any conditions that it saw fit. (*McElrath* v. *United States*, *supra*, pp. 439, 440.)

For the reasons stated it is submitted that the demurrer should have been sustained on the third ground alleged therein.

IV.

**There is no liability on the tribe under an oral agreement.**

The original petition set up an agreement with the chiefs and head men to bind the tribe to indemnify and assure payment to the appellant and the said Stacy. The Court of Claims held that such an

agreement should have been in writing, under the fourth section of the statute of frauds. The appellant amended his petition by cutting out the guaranty clause and leaving the petition otherwise substantially unaffected. It is true a statement was made at the end of the amendment (Rec., p. 5) that credit was extended, when the goods were furnished solely to the tribe, but this statement was no part of the agreement set up. The court in deciding the demurrer to the amended petition held that even with the guaranty stipulation eliminated, the alleged agreement should have been in writing, under section 2103 of the Revised Statues.

The Court of Claims also said, in both opinions, that it was doubtful whether the chiefs or head men had shown authority to make such an agreement (Rec., p. 12). We, however, believe it is very clear that they did not. The permit to cut and sell the wood, made part of the petition by reference, gave no such authority, and there is nowhere else to look for it. The permit merely gave the Menominee *Indians* leave to cut surplus dead and down wood and dispose of it under the oversight of the Indian agent. (Appendix D, p. 37.) Therefore, the agreement would not have been binding upon the tribe if it had been in writing, and a reference by Congress under a special act would not render it more so.

Mr. Justice Van Devanter, who delivered the opinion of this court in *United States* v. *The Mille Lac Band of Chippewa Indians* (229 U. S., 498), discussing the functions of a jurisdictional act, said: "The juris-

dictional act makes no admission of liability, or any ground of liability on the part of the Government, but merely provides a forum for the adjudication of the claim according to applicable legal principles."

(Cooley, Principles of Constitutional Law, 1st ed., p. 319.) (Id., 3d ed., p. 358.)

The cases cited by the appellant, to show that the alleged contract need not have been in writing, as required by section 2103 of the Revised Statutes, in order to be binding on the tribe, have no application to the facts in this case. (Appellant's brief, pp. 27–30.) The cases cited were brought upon parol agreements made with the United States and not with tribal Indians. Consequently they present very different questions of law from cases brought upon oral agreements with the wards of the nation with whom agreements were required for *their* protection to be in writing.

**The tribe is not liable for the negligence or torts of the Indian agent.**

The appellant in his amended petition alleges that the Indian agent received the proceeds from the sale of the logs and if he had carried out the agreement the claims would have been settled and there would have been no cause for complaint, but that he did not do so. What he did with the proceeds has not been stated. If he had been directed by the proper authorities of the Government to settle the accounts of the appellant and the said Stacy, his failure to do so would have been a tort of which this court has no

jurisdiction. (*Langford* v. *United States*, 101 U. S., 341, 345.) If, however, there were no such instructions issued to the agent, his misapplication of the funds would be a matter entirely between himself and the licensed traders. The Court of Claims in its opinion (Rec., p. 13) said the tribe can not be held responsible for his neglect, as the only agreement was that the payments should be made out of the first proceeds from the sales and that the agent's default can not be construed as the default of the tribe.

For the reasons stated it is submitted that the demurrer was properly sustained as to the fourth ground stated therein.

*Conclusion.*

Therefore we respectfully submit that the judgment of the lower court sustaining the demurrer of the Government to appellant's amended petition should be affirmed.

HUSTON THOMPSON,
*Assistant Attorney General.*

## Appendix A.

## PETITION.

[Filed June 8, 1908.]

*To the Chief Justice and Judges of the Court of Claims:*

Your petitioner respectfully represents and shows:

1. That he is a citizen of the United States and a resident of the State of Wisconsin.

2. That by virtue of the provisions of an act of Congress, entitled "An act to authorize the Secretary of the Interior to issue patents in fee to purchasers of Indian lands under any law now existing or hereafter enacted, and for other purposes," approved on the 29th day of May, 1908, jurisdiction was conferred on this court to hear, determine, and render final judgment, notwithstanding lapse of time or the statute of limitations, for any balance found due petitioner against or from the Menominee Tribe of Indians in Wisconsin, or any of them, for supplies, goods, wares, merchandise, tools, and live stock furnished certain members of that tribe after January 1, 1880, for the purpose of carrying on logging operations upon the Menominee Indian Reservation in that State; and your petitioner avers that between the 1st day of January, 1886, to and including October 31, 1889, he and W. H. Stacy were duly licensed traders, in conformity with law, with the Menominee Tribe of Indians, who were then and now are under the care and guardianship of the United States, and within the country occupied by those Indians, known as the Menominee Reservation, Green Bay Agency, Wis.; that in the fall of 1886, the members of the tribe were in want, destitution, and without available means of support,

and on the request of such Indians for the right to cut and sell timber from their reservation, the United States authorized and empowered the then Indian agent for those Indians to permit the Indians to cut and sell the dead and down timber on such reservation, the proceeds to go to the benefit of the said tribe and of those performing labor in that respect, and thus provide the Indians with means of support, as well as teach them industrious and thrifty habits, honesty, and integrity. The Indians were not able to take advantage of such permission to cut and market that timber, for they were destitute and without means to purchase supplies, were without credit, and were unable to obtain it for that purpose. In order that the Indians might be relieved of their difficulties and their urgent necessities be provided for, it was agreed by the Indian agent and the head men of the tribe that if petitioner and W. H. Stacy would extend credit to the companies, crews, or squads of Indians that should be formed for the purpose of carrying on logging operations, and also extend a limited amount to their respective families, that the same method of payment for supplies so furnished should be continued as had been agreed upon with the previous trader, M. Wescott, which method of payment was discussed and agreed upon by the Indian agent and by the head men through their interpreter. The head men through their interpreter pledged themselves for the payment of such supplies furnished, such payment to be out of the first proceeds of the sale of the logs, and thereupon it was agreed by and through the Indian agent, and the head men of the Menominee Tribe, to and with this petitioner and said Stacy, that the Menominee Tribe of Indians would indemnify petitioner and said Stacy and assure the payment to them of all supplies so to be furnished by them; that all logs cut and hauled by the Menominee Tribe in the logging operations were to be sold through the Indian agent to the highest and best bidder; and that the prices for such supplies as were to

be furnished by the petitioner should be such prices as were being paid in cash for similar supplies in that part of the State, with transportation added.

3. The condition of the Indians remained such through the following winters and into the year 1889 that the petitioner and said W. H. Stacy, under and pursuant to the agreement above described, and with the approval of the Indian agent and of the United States, were obliged to and did continue to furnish those Indians with supplies, and for the supplies so furnished said Indians the petitiorer and said Stacy were promptly paid, with a few exceptions, until the year 1889, at which time and during that year and from that year until this time the Indians and the Government of the United States failed to pay for the supplies furnished said Indians in that year. The following is a statement of the supplies furnished as aforesaid, but which have not been paid for:

| | |
|---|---|
| Frank Waubone | $58.04 |
| Mose Pahtise | 47.00 |
| Mose Corn | 3.20 |
| Paul Baxter | 75.09 |
| Paul Ke ne bonay | 130.98 |
| Knete Quot Ke saw | 49.32 |
| Mose L. Bear | 41.13 |
| Peter Wytossa | 33.59 |
| Robert me so man | 10.26 |
| Louis Shawano | 32.84 |
| Catharine Dequndre | 19.42 |
| Frank Redcloud | 11.93 |
| Antoine Stick | 199.69 |
| Peter Ke she not kow | 19.72 |
| Louis Keshena | 20.32 |
| J. D. Grignon | 45.39 |
| John Cardish | 39.16 |
| Peter Pahmonecote | 105.40 |

| | |
|---|---|
| Isaac At pak kiew | $65.75 |
| Mose Nunway | 47.11 |
| Jacob Mosomon | 6.38 |
| Joseph Ke che Kum | 42.92 |
| Mitchel Macabee | 23.57 |
| Jos. Ashkeohequam | 72.73 |
| Louis Tucker | 62.67 |
| Harret Iahmokeiw | 39.00 |
| John Dick | 100.77 |
| Peter Martin | 66.82 |
| Lewis Dodge | 163.91 |
| Gabe Pahmanstuck | 18.73 |
| Barney Waukecheon | 313.81 |
| John V. Satterlee | 176.88 |
| Joseph Peyanasset | 57.13 |
| Dave Kuh Kem me kiew | 33.57 |
| Kah ma won | 69.05 |
| Dave Iah sha ta ka | 13.76 |
| Dominick Morgan | 21.07 |
| Fred Grignon & Co | 10.00 |
| Lewis Waukets | 7.63 |
| Eleek V. Corn | 61.02 |
| Charles Wescott | 39.92 |
| Gus Valandra | 176.69 |
| Joseph Oshkenaniew | 174.45 |
| John Keshenatassa | 14.97 |
| Jos. Payatch cuett | 57.08 |
| Chickney, Chief | 67.34 |
| Bill Keshkatapa | 25.07 |
| John Petetah | 180.17 |
| Alex. Peters | 2.08 |
| Lewis Oshkenaniew | 367.45 |
| Peter Tomah | 183.79 |
| Fred Grignon | 288.81 |
| Chas. Somon | 13.51 |

| | |
|---|---|
| Linn Waupoose | $17.35 |
| Henry Melott | 176.43 |
| Noah Peters | 225.26 |
| Mitchel Wossan | |
| Antoine Iah sha | 155.76 |
| John Tomoon | 116.53 |
| Mitchel Waubono | 21.85 |
| Mary A. Martin | 64.98 |
| Mose Sanapan | 23.04 |
| Jos. Grignon | 350.90 |
| Jerome Pynesha | 183.19 |
| Lyman Skesecks | 3.95 |
| John Wiscoby | 565.49 |
| Quahkesan & Co | 45.63 |
| M. Bresbois & Co | 461.35 |
| John Waupoose | 677.05 |
| Martin & Waukicheon | 76.77 |
| Barney Brisbois | 194.82 |
| Mose Sanapan | 12.88 |
| Mitchel Oshkenaniew | 454.32 |
| John Shanawet | 62.32 |
| John Latender | 827.17 |
| Mitchel Kosh Kosh Ka | 75.81 |
| Anton Waubono | 32.28 |
| Paul Davis | 7.84 |
| Chas. Baxter | 27.99 |
| Jos. Davis | 732.38 |
| Lewis Skesecks | 52.37 |
| Al Boyed | 731.79 |
| J. B. Waukoheon | 30.38 |
| Mose Maikauck | 15.02 |
| Shawanoassha | 4.00 |
| Kasa Ashpahmasha | 10.40 |
| Geo. Payawaset | 64.94 |
| John L. Dodge | 43.06 |

| | |
|---|---|
| Aconomy Oshkosh | $44.19 |
| Jos. Lamotte | 81.63 |
| Keshe Ka niew | 3.00 |
| Chequa | 2.80 |
| J. Wiscoby | 151.17 |
| Chas. Chickney | 10.20 |
| Lewis Komanakin | 89.18 |
| Jo Nosecum | 76.42 |
| Jos. La Fransbois | 34.20 |
| William Prickett | 25.72 |
| Steve Askamett | 28.24 |
| Mitchel Kah pah o sha | 55.43 |
| Mose McKimatas | 3.40 |
| Mose Corn | 17.07 |
| Pah mah kah na tuck | 3.40 |
| John Tucker | 8.83 |
| Jo nah wah quate | 32.44 |
| Mashequett & Co | 144.73 |
| Mitchel Beaupre | 78.65 |
| Jo McKemetas | 342.64 |
| Sopha Grignon | 121.76 |
| The. Johnson | 147.83 |
| Simon Dodge | 24.13 |
| Jo Shawano Kesick | 80.91 |
| John Mashequett or Sanopau | 10.24 |
| John Pomgleton | 3.69 |
| Frank Moskowet | 8.10 |
| Mose Tice | 4.31 |
| Kow e Kett | 7.29 |
| Jo me ah wa non | 53.52 |
| Lewe Durham | 20.81 |
| Lewe Waupoose | 159.35 |
| Mitchel Foxy | 7.91 |
| Nespet | 53.86 |
| Ah she ca tah | 10.00 |

| | |
|---|---|
| John Menash | $28.20 |
| Gus Corn | 3.40 |
| Kosh kesh e ka | 49.15 |
| Pete Wascum | 2.41 |
| Pah she mah Yesha | 15.16 |
| Jos. Werhae | 5.95 |
| Pah turn | 1.55 |
| Nah yah to | 3.94 |
| Way ma co no met | 32.51 |
| Keokuk | 10.10 |
| Jo Seymour or Corn | 18.38 |
| Mitchel Shawanomeatto | 4.34 |
| Pah man | 2.62 |
| John Waukan | 24.42 |
| Waukeshan, Chief | 9.81 |
| Pay a wa set | 85.55 |
| She pe kan | 3.34 |
| Louis Kah katch | 5.90 |
| Ed Menominee | 9.02 |
| Peter Che tank pah choka | 4.00 |
| Soloma Match spato | 6.44 |
| Mashaquett | 13.28 |
| P. Akemart | 11.88 |
| Mitch. Lamotte | 6.10 |
| Arbert La Rush | 5.76 |
| Louis La Franbois | 103.70 |
| Peter Fly | 18.76 |
| Sam Pahwasha | 3.85 |
| Peter Wa was cum | 5.35 |
| J. B. Beaupre | 9.45 |
| Jim Pah me watt | 11.58 |
| Aha rah man | 10.45 |
| M. Wy tossa | 2.83 |
| John Corn | 11.68 |
| Mary Lamotte | 11.40 |

4. Petitioner and said Stacy, in complying with the contracts and to avoid any extensive and unwarranted amounts of credit, inaugurated, at their own expense, a system of accounting, whereby they made a careful count of the logs cut and hauled by the companies, squads, and individuals of the Indians, as well as the supplies furnished them for their benefit and for and on behalf of the tribe. All the supplies furnished to the Indians, after the making of the agreements aforesaid, were of good quality and were sold, delivered, and supplied to that tribe in the manner in this petition stated, and at the prices thus agreed upon.

Petitioner avers that the Indian agent at the Green Bay Agency received the proceeds of the sale of logs so cut, hauled, banked, and delivered by the Indians, who were furnished supplies by petitioner and said Stacy, which amounted to a large sum, and that if the proceeds of such sales had been applied by such Indian agent to the payment of the supplies furnished by petitioner and Stacy in accordance with the agreements herein described, the bills and accounts for the supplies so furnished would all have been paid and satisfied, but such proceeds were not so applied.

Petitioner further says that the logging operations conducted and the credits extended by him and Stacy were for the benefit of the tribe, they received the entire benefit thereof, and they were thus enabled to support themselves and their families, which would have been difficult, if not impossible, without the aid of such credit to enable them to carry on the logging operations.

Petitioner is informed and believes, and on such information and belief he avers, that there is a large fund in the possession of the United States to the credit and for the benefit of said Menominee Tribe of Indians derived through their logging operations, and now amounting to more than a million and a half of dollars, which fund has been accumulated through the credit extended and assistance rendered

by licensed traders to the Menominee Indians in logging operations.

5. Petitioner avers that in the autumn of 1886, when the agreement was reached between the United States, the Menominee Tribe of Indians, the said W. H. Stacy, and this petitioner, the said Stacy was the duly licensed trader to and with the Menominee Indians on their reservation, and that petitioner was employed by the said Stacy to have, and therefore he did have, full charge and supervision over the entire business and matters pertaining to the several transactions had, as in this petition set forth, all with the consent and under the control of the Commissioner of Indian Affairs and with an agreement ratified and confirmed by such commissioner, whereby petitioner was to receive for his said services one-half of the profits to be derived from the business conducted under the license to the said Stacy as such trader. Petitioner further avers that when the term of said Stacy and the term of this petitioner as Indian traders to the Menominee Indians expired, and it became necessary to have an accounting to determine petitioner's interest in the proceeds of such business, litigation arose between petitioner and said Stacy, and a receiver was appointed to take charge of the affairs and matters of that business, and such receiver did take charge thereof and of the assets and liabilities and made an accounting of the same to the court having jurisdiction of such litigation, and thereafter such proceedings were had under the order and direction of such court that all the assets of said business, including the accounts and claims herein sued upon, were put up for sale by said receiver, and they were sold to this petitioner, including the accounts, claims and demands, rights and credits sued upon in this petition, and the same were delivered to the petitioner, together with all books of account, and since that time have been, and now are, his exclusive property and in his possession, no assignment or sale of any portion thereof having been

made by this petitioner to any other person or to any corporation.

6. Your petitioner avers that there is due him from the Menominee Tribe of Indians, or from the individual members thereof, as may be found and adjudicated by the court, the sum of thirteen thousand and eighty-seven dollars forty-six cents ($13,087.46).

Wherefore the petitioner prays judgment for thirteen thousand and eighty-seven dollars forty-six cents ($13,087.46).

DUDLEY & MICHENER,
*Attorneys of Record.*

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STATE OF WISCONSIN, }
*County of Shawano.* } *ss.*

Before me, a notary public in and for said county and State, on this 5th day of June, 1908, appeared F. F. Green, who is personally known to me to be the petitioner in the above-entitled case, who being first sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says that he is the petitioner in the above-entitled case; that he has read the petition and has knowledge of the contents thereof, and that the matters and things therein set forth are true in substance and in fact, as he is informed and believes.

F. F. GREEN.

Subscribed and sworn to before me, this 5th day of June, A. D. 1908.

ROBT. A. UPHAM,
[SEAL.] *Notary Public, Shawano Co., Wis.*

## Appendix B.

### DEMURRER TO CLAIMANT'S ORIGINAL PETITION.

Now come the defendants, by the Attorney General of the United States, and demurring to the petition in this cause, state as the ground thereof that the facts alleged in said petition do not constitute a cause of action within the jurisdiction of this court.

And further demurring to the said petition, state as the ground thereof that the act of May 29, 1908 (35 Stat., 444, 445), referring the claim to this court, was enacted by Congress in violation of certain provisions of the Constitution of the United States, and conferred no jurisdiction upon this court to consider the subject matter of the said petition.

And further demurring to the said petition, state as the ground thereof that the petition does not allege facts sufficient to constitute a cause of action.

## Appendix C.

### AMENDMENTS TO PETITION.

Having been heretofore granted permission by the court, petitioner now makes and files the following amendments to the petition in this case:

1. Amend the petition by inserting in the title of the case the words "and the United States" after the word "Wisconsin," so that the title of the case shall be and stand as follows:

F. F. Green
*v.*
The Menominee Tribe of Indians in Wisconsin and The United States. } No. 30179.

2. Amend paragraph 2 of the petition by inserting after the words "such Reservation," the following words, "ten per cent of," so as to make the paragraph aver that ten per cent of the proceeds of the sale of the dead and down timber on such reservation should go to the benefit of the tribe.

3. Amend paragraph 2 of the petition by striking out its last sentence and inserting in lieu thereof the following matter:

That the said agreement made with the said M. Wescott was entered into on or about the first day of December, 1881, under the conditions and to the effect stated below. On and before December 1, 1881, the Menominee Indians were in a destitute condition, without credit or available means of support, and had procured the right

to cut and sell the dead and down timber on their reservation, but were unable to engage in such work for the reason that they lacked equipment and supplies necessary for the prosecution thereof, and were unable to secure such equipment and supplies on account of lack of credit. That about said date the Commissioner of Indians Affairs sent one John A. Wright, of Baltimore, Maryland, a special agent, to the Menominee Reservation for the express purpose of making some arrangement whereby the Indians could obtain equipment and supplies necessary for engaging in logging operations. That thereupon a council of the tribe was held at Keshena, Wisconsin, which was attended by all the chiefs and head men of the tribe, and practically all the members thereof, and also by the Indian agent, and it was thereupon agreed by and between the said M. Wescott as one party to the agreement, and the Menominee Indian Tribe as the other party thereto, that the said M. Wescott, the duly licensed Indian trader, at Keshena, Wisconsin, should furnish necessary equipment and supplies to those members of the tribe who desired to engage in logging operations to enable them to carry on such work, and support their respective families while so engaged, such equipment and supplies not to exceed the sum of $2.50 for each thousand feet of logs so cut and sold; that all logs cut and hauled by the Menominee Tribe in the logging operations were to be sold through the Indian agent to the highest and best bidder; and that the prices for such supplies as were to be furnished by the petitioner should be such prices as were being paid in cash for similar supplies in that part of the State, with transportation added; and that said Menominee Tribe promised and agreed that such equipment and supplies so furnished should be paid for out of the first proceeds from the sale of the logs so to be cut and sold. That said agree-

ment was made with the consent and approval of the Indian agent residing at Keshena, Wis., and in charge of said Menominee Indian Reservation, and also by said special agent, John A. Wright. That said agreement had the unanimous approval of all members of the tribe present at said council. That said agreement was made orally by the said M. Wescott, personally, and by the chiefs and head men on behalf of said tribe, which method of agreement then was, and for a long time prior thereto, had been the only method of entering into contracts by said Menominee Tribe of Indians; that the authority of the chiefs and head men of the tribe to contract for and on behalf of the tribe had never been questioned by any member of said tribe; and that contracts so entered into had always been treated as valid and binding on the tribe, and fulfilled by the tribe, without objection on the part of any member thereof. That said agreement and contract with the Menominee Tribe remained in force until the said M. Wescott ceased to be the licensed Indian trader, and your petitioner was duly appointed as such in the fall of 1886.

That on or about the 1st of January, A. D. 1887, it was mutually agreed by and between your petitioner and W. H. Stacy on the one part, and the Menominee Tribe of Indians on the other, that the agreement above set out with M. Wescott should be continued in full force and effect with your petitioner and said W. H. Stacy. That said last-mentioned agreement was made with your petitioner and W. H. Stacy, personally, and on behalf of the Menominee Tribe by the chiefs and head men thereof, which said chiefs and head men still continued to have and were recognized as having authority to make contracts in behalf of and binding on said tribe. That said last-mentioned agreement was approved by the Indian agent at Keshena, Wis., and was acquiesced in by all

members of said tribe, and treated by all parties interested as valid and binding on the contracting parties. That your petitioner and the said W. H. Stacy furnished the equipment and supplies for which judgment is claimed in this action, in accordance with and relying upon said agreement, and did not and would not extend credit to the individual members of said tribe, but extended such credit solely to the tribe, relying upon said agreement.

DUDLEY & MICHENER,
*Attorneys for Petitioner.*

DISTRICT OF COLUMBIA, *ss*:

Louis T. Michener, being duly sworn, deposes and says that he is a member of the partnership of Dudley & Michener, such partnership being authorized by power of attorney in this case filed, to make affidavit; that he has read and understands the foregoing amendments to the petition; and that he is informed and believes that the statements therein contained are true in substance and in fact.

LOUIS T. MICHENER.

Subscribed and sworn to before me this 11th day of March, 1911.

[SEAL.] HERBERT L. FRANC,
*Notary Public, District of Columbia.*

## Appendix D.

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Department of the Interior,
Office of Indian Affairs,
*Washington, November 28, 1881.*

E. Stephens,
*United States Indian Agent,*
*Green Bay Agency, Wis.*

Sir: I notice in your annual report a statement that the Indians of your agency complain that they are not allowed to dispose of the dead and down timber going to waste on their reserve.

You are hereby informed that the sale of such timber is allowed by this office; but great care must be taken by you to see that the Indians dispose of only surplus dead or down wood which without such disposition would soon become worthless, and that they do not take advantage of this permission to cut other timber, in violation of section 262, "Instructions to Indian agents."

Personal oversight should be exercised by you of the bargains and sales made by Indians under this authority, and that they should understand that a failure to observe the restrictions of this permission will result in a forfeiture of the permit.

Yours, respectfully,

H. Price,
*Commissioner.*



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# GREEN *v.* MENOMINEE TRIBE.

APPEAL FROM THE COURT OF CLAIMS.

No. 285. Argued March 13, 16, 1914.—Decided May 11, 1914.

Section 2 of the act of May 29, 1908, c. 216, 35 Stat. 144, conferring jurisdiction on the Court of Claims to hear and determine claims of certain Indian traders against the Menominee Tribe of Indians and certain members thereof, created no new right in favor of such traders except removal of the bar of limitations, and gave no right to sue the United States or any member of the Tribe in his individual capacity

as disassociated from his dependent condition as an Indian subject.

A contract by a tribe of Indians to guarantee payment of supplies to individual members thereof must conform to § 2103, Rev. Stat.

A claim for lumber equipment furnished to individual members of a tribe of Indians on the guarantee of the Tribe based on an agreement that the proceeds of the lumber cut should, to the extent permitted by the Government, pass through the hands of an agent and be applied to payment for the equipment cannot be enforced, under the act of May 29, 1908, against the Tribe or the Indians as members thereof or the United States when it appears that such proceeds of the lumber were collected by the agent and misapplied.

The right of a licensed Indian trader to deal with Indian tribes and individual Indians does not extend to making unlawful contracts.

47 Ct. Cl. 281, affirmed.

THE facts, which involve a claim against the Menominee Tribe for supplies furnished to individual members of the Tribe and the jurisdiction of the Court of Claims to consider such claim under the act of May 29, 1908, are stated in the opinion.

*Mr. L. T. Michener*, with whom *Mr. P. G. Michener* and *Mr. C. F. Dillett* were on the brief, for appellant:

Full jurisdiction was conferred on the Court of Claims by § 2, act of May 29, 1908, 35 Stat. 444.

Appellant had the right to make the United States a party defendant to this action.

Congress had power to confer jurisdiction on the Court of Claims to adjudicate this case, even if the Indians were and are citizens of the United States.

The Secretary of the Interior and other officers have broad powers in dealing with Indian affairs.

The statutes conferred on the traders the right to trade with the Indians.

The agreement sued on related to dead and down timber and was made lawfully.

The petition alleges facts sufficient to constitute a cause of action.

Rev. Stat., § 2103, does not apply to the contract in the case at bar.

In support of these contentions, see *Blackfeather* v. *United States*, 155 U. S. 180, and 190 U. S. 368; *Braden's Case*, 16 Ct. Cls. 389; *Campbell* v. *Holt*, 115 U. S. 620; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Clark* v. *United States*, 95 U. S. 539; *Dahlgren's Case*, 16 Ct. Cls. 30; *Delaware Indians* v. *Cherokee Nation*, 193 U. S. 127; *Ex parte Wall*, 107 U. S. 265; *Journeycake* v. *Cherokee Nation*, 155 U. S. 196; *La Abra Mining Co.* v. *United States*, 175 U. S. 423; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *McElrath* v. *United States*, 102 U. S. 426; *Navarre's Case*, 33 Ct. Cls. 235; 173 U. S. 77; *Neal's Case*, 14 Ct. Cls. 280; *Nor. Pac. R. R. Co.* v. *Lewis*, 162 U. S. 366; *Roberts* v. *United States*, 92 U. S. 539; *Sac and Fox Indians Case*, 220 U. S. 481; *Tiger* v. *West. Invest. Co.*, 221 U. S. 286; *Townsend* v. *Little*, 109 U. S. 504; *United States* v. *Celestine*, 215 U. S. 278; *United States* v. *Cook*, 19 Wall. 591; *United States* v. *Nix*, 189 U. S. 199; *United States* v. *Rickert*, 188 U. S. 278.

*Mr. Assistant Attorney General Thompson* for the United States:

Appellant has attempted to set up a new and different agreement in his amended petition.

The United States have not been properly made a party defendant.

Congress has no power to refer controversies between residents of the same State to the Court of Claims.

Congress has no power to waive the statute of limitations in this case.

Service of notice was necessary in order to give Court of Claims jurisdiction of the persons of defendants.

Property rights of individual Menominee Indians are protected by state laws of Wisconsin.

Individual tribal Indians have the right to sue and be sued in the courts of States where they reside.

There is no liability on the tribe under an oral agreement.

The tribe is not liable for the negligence or torts of the Indian agent.

In support of these contentions, see *Alter's Appeal*, 67 Pa. St. 34; 15 Am. & Eng. Ency., 2d ed., 11, 12; *Brown* v. *United States*, 44 Ct. Cls. 283, 311; *Bank of Columbia* v. *Okely*, 4 Wheat. 234, 242; *Cohens* v. *Virginia*, 6 Wheat. 264, 293; *Clement* v. *Sigur*, 29 La. Ann. 798, 802; *Ex parte Wall*, 107 U. S. 265, 289; *Felix* v. *Patrick*, 145 U. S. 317, 332; *Finn* v. *United States*, 123 U. S. 227; *Forbes* v. *Mitchell*, 1 J. J. Marsh. 440, 441; *Green* v. *Menominee Indians*, 46 Ct. Cls. 68, and 47 Ct. Cls. 281; *Gho* v. *Julles*, 1 Wash. Ter. 325, 329; *Godfroy* v. *Scott*, 70 Indiana, 259; *Hitchcock* v. *United States*, 22 App. D. C. 275; *Hite* v. *Hite*, 2 Rand, 409, 417; *Ingraham* v. *Ward*, 56 Kansas, 550; *Justices* v. *Murray*, 9 Wall. 274, 287; *Ke-tuc-e-mun-guah* v. *McClure*, 122 Indiana, 541; *Langford* v. *United States*, 101 U. S. 341, 345; *La Abra Mining Co.* v. *United States*, 175 U. S. 423; *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272, 276; *McElrath* v. *United States*, 102 U. S. 426, 439; *Palairet's Appeal*, 67 Pa. St. 479; *Rubideaux* v. *Vallie*, 12 Kansas, 38, 52; *Stacy* v. *La Belle*, 99 Wisconsin, 520, 524; *Schick* v. *United States*, 195 U. S. 71, 72; *Swartzel* v. *Rogers*, 31 Kansas, 374; *Stewart* v. *United States*, 206 U. S. 185; *United States* v. *Kagama*, 118 U. S. 375; *United States* v. *Klein*, 13 Wall. 128; *United States* v. *Flournoy*, 69 Fed. Rep. 891; *United States* v. *Mille Lac Indians*, 229 U. S. 498; *Vigo's Case*, 21 Wall. 648; *Woodford* v. *Baker*, 10 Oregon, 491, 494; *Water Valley* v. *Seamen*, 53 Mississippi, 655, 660. See also act of May 29, 1908 (jurisdictional act), 35 Stat. 445, 446; act of March 31, 1882 (ratifying permit), 22 Stat. 36, 37; acts of June 12, 1890 (showing how tribal fund was created), 26 Stat. 146, and June 28, 1906, 34 Stat. 547; Const. U. S., Art. III, §§ 1 and 2; Fifth and Seventh Amendments; Const. Wisconsin, Art. 1, § 5; *Id.*, Art. 75,

§ 20; Statutes Wisconsin, §§ 2629, 2630, 4222, 4225; Judicial Code, §§ 24, 145, 233, 235.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

By this appeal a review is sought of a judgment of the court below holding that an amended petition filed by the appellant stated no cause of action and dismissing the same. (47 Ct. Cls. 281.) Our attention therefore must be directed to the petition, but as a means of at once clarifying the issues, we refer to the act of Congress authorizing the suit and briefly state the averments of an original petition which was likewise dismissed because stating no cause of action.

By an act of Congress of May 29, 1908 (35 Stats. 444, c. 216, § 2), jurisdiction was conferred upon the Court of Claims "to hear, determine, and render final judgment, notwithstanding lapse of time or statute of limitation, for any balances found due, without interest, with the right of appeal as in other cases," upon the claims of eight named persons who were described in the act as "traders," against the "Menominee tribe of Indians in Wisconsin and against certain members of said tribe at the Green Bay Agency, for supplies, goods, wares, merchandise, tools, and live stock furnished certain members of the said tribe after the first day of January, in the year eighteen hundred and eighty, for the purpose of carrying on logging operations upon the Menominee Indian Reservation, in Wisconsin." The statute further provided: "Said court shall, in rendering judgment, ascertain and determine the amount, if any, due upon each of said claims, and if the court find that there is a liability upon any of said claims, it shall then determine if such liability be that of the said Menominee tribe of Indians as a tribe or that of individual members of said tribe, and it shall

render judgment for the amount, if any, found due from said tribe to any of said claimants, and it shall render judgments for the amounts, if any, found due from any of the individual members of said tribe to any of said claimants." The statute then provided the means by which the judgments, if any were rendered, whether against the tribe or against individual Indians, should be paid.

Green, the appellant, one of the traders named in the act, sought to recover from the Menominee tribe and 158 named members thereof an amount alleged to be the price of certain equipment and supplies alleged to have been furnished by him. The liability of the individual Indians was based upon averments that they had received during the years 1886 to 1889 the amount of the equipment and supplies sued for, and that they had contracted to pay for the same, the supplies having been furnished them to enable them to carry on logging operations on the Menominee Reservation in Wisconsin. The liability of the tribe was based on averments that it had expressly guaranteed that the individual Indians, members of the tribe, would pay for the supplies furnished them for the purposes and under the circumstances alleged. The defendants jointly demurred on two grounds: first, that the act conferring authority to bring suit was repugnant to the Constitution, and second, because the petition stated no cause of action. Holding that Congress had the undoubted power to pass the jurisdictional act, the court overruled the first ground. It also overruled the second ground as to the individual members of the tribe who were made defendants, but it sustained the exception of no cause of action as to the tribe, the court holding that "under the averments of the petition the Menominee Tribe of Indians is but a naked guarantor for the debt of another, and such promise not being in writing is void under the statute of frauds." The suit, as to the tribe, was therefore dismissed.

By leave, an amended petition was filed stating a new cause of action and joining the United States as defendant. This petition after alleging that the petitioner was a citizen of the United States and a resident of Wisconsin and after counting upon the jurisdictional act, made in substance the following averments: That in 1881 the Menominee Indians on the reservation were in a destitute condition and to save them and their families from starvation, the United States granted them permission to cut and sell the dead and down timber on the reservation "ten per cent. of the proceeds to go to the benefit of the said tribe and of those performing labor in that respect." That when it developed that the Indians, because of their extreme poverty and want of credit could not procure the equipment and supplies which were essential to enable them to make use of the permission, the Commissioner of Indian Affairs sent a special agent, John A. Wright, to the Reservation to make some arrangement whereby such condition could be remedied. That a council of the tribe was thereupon held, attended by all the chiefs and head men and practically all the members of the tribe, and it was agreed by and between the then Indian Trader, M. Wescott, "as one party to the agreement, and the Menominee Indian Tribe as the other party thereto, that the said M. Wescott, the duly licensed Indian Trader, at Keshena, Wisconsin, should furnish necessary equipment and supplies to those members of the tribe who desired to engage in logging operations to enable them to carry on such work, and support their respective families while so engaged, such equipment and supplies not to exceed the sum of $2.50 for each thousand feet of logs so cut and sold; that all logs cut and hauled by the Menominee Tribe in the logging operations were to be sold through the Indian Agent to the highest and best bidder; and that the prices for such supplies as were to be furnished by the petitioner, should be such prices as were being paid in cash for similar

supplies in that part of the State, with transportation added; that said Menominee Tribe promised and agreed that such equipment and supplies so furnished should be paid for out of the first proceeds from the sale of the logs so to be cut and sold. That said agreement was made with the consent and approval of the Indian Agent residing at Keshena, Wisconsin, and in charge of said Menominee Indian Reservation, and also by said special agent, John A. Wright. That said agreement had the unanimous approval of all members of the tribe present at said council. That said agreement was made orally by the said M. Wescott, personally, and by the chiefs and head men on behalf of said tribe. . . ." It was alleged that the agreement thus made was carried out by the tribe and by Wescott who made advances for the purposes of the operations in cutting the dead and down timber and continued to do so until the year 1886 when Wescott ceased to be the Indian trader and was succeeded by Green, the petitioner, and one Stacy whose rights the petitioner Green had acquired. The petition then charged that as the condition of destitution and inability to obtain equipment and supplies which had led to the making of the agreement with Wescott yet prevailed after petitioner and Stacy became the Indian traders, on the first of January, 1887, it was agreed between petitioner and Stacy and the tribe that the previous agreement should be continued in full force and effect with petitioner and Stacy, the petition expressly averring that "said last mentioned agreement was made with your petitioner and W. H. Stacy, personally, and on behalf of the Menominee Tribe by the chiefs and head men thereof, which said chiefs and head men still continued to have and were recognized as having authority to make contracts in behalf of, and binding on said tribe. That said last mentioned agreement was approved by the Indian Agent at Keshena, Wisconsin, and was acquiesced in by all members of said tribe, and treated by all

parties interested as valid and binding on the contracting parties."

It was averred that up to 1889 supplies were furnished in accordance with the agreement with the approval of the Indian agent and the United States, and with a few exceptions were paid for by the methods pointed out by the contract; that during the year 1889, however, supplies amounting to $13,087.46 were furnished to 158 members of the tribe, the name of each member and the amount supplied him being stated, for which payment had not been made either by the Indians, the tribe, or the United States.

It was further averred that such unpaid for supplies were furnished "in accordance with and relying upon said agreement" and that petitioner and Stacy "did not and would not extend credit to the individual members of said tribe, but extended such credit solely to the tribe, relying upon said agreement." It was further alleged that the proceeds from the sales of the dead and down timber cut and hauled by the Indians were received by the Indian agent and if the amounts which came into his hands in accordance with the contract and which were subject by its terms to be applied to the payment of the supplies advanced under the terms of the agreement had been so applied, all the supplies would have been paid for, but that they remain unpaid for because "such proceeds were not so applied." After averring that the logging operations and the credits extended by the petitioner and Stacy were for the benefit of the tribe, the petition charged that "there is a large fund in the possession of the United States to the credit and for the benefit of said Menominee Tribe of Indians, derived through their logging operations, and now amounting to more than a million and a half of dollars, which fund has been accumulated through the credit extended and assistance rendered by licensed traders to the Menominee Indians in logging operations,"

but there was no averment that such sum or any part thereof was derived from payments made to the United States by the Indian agent of any portion of the sum derived from the ten per cent. provided for in the contract and which, it was contemplated would be used by the Indian agent for the purpose of paying the trader for the supplies furnished by him. There was also no averment that the money to the extent of the amount of the supplies which was received by the Indian agent out of the funds of the Indians and which was not by him applied to pay for the supplies, was ever turned over to the Indians or that they became in any way the beneficiaries thereof.

The petition concluded with the following averment and prayer:

"Your petitioner avers that there is due him from the Menominee Tribe of Indians, or from the individual members thereof, as may be found and adjudicated by the court, the sum of Thirteen Thousand and Eighty-seven Dollars, Forty-six Cents ($13,087.46).

"Wherefore the petitioner prays judgment for Thirteen Thousand and Eighty-seven Dollars, Forty-six Cents ($13,087.46)."

By a general demurrer the defendants besides questioning the right to file the amended petition on the ground that it constituted an entire departure, and insisting in any event that, if there was a right to file it, its averments did not state a cause of action, denied the right to implead the United States as a defendant and challenged the constitutionality of the jurisdictional act. The court without specifically directing its attention to the other grounds came to consider whether the amended petition stated a cause of action and deciding that it did not, dismissed the cause, and as we at the outset said, the rightfulness of its action in so doing is the matter we are called upon to decide.

The contentions pressed upon the one side to sustain the correctness of the conclusion of the court below and

on the other to demonstrate the existence of reversible error, all but involve an examination of the reasoning which led the court to its conclusion and we think the most direct way to dispose of the case will be to state under separate headings the propositions to which the court gave its sanction and the reasons relied upon to establish that error was committed.

1. The court held that the jurisdictional act except so far as concerned the statute of limitations created no new right in favor of the petitioner, but simply afforded a means of establishing by a proceeding in the Court of Claims the existence, if any, of a claim against the tribe and the individual members of the tribe as such. From this premise the conclusion was deduced that the act gave no right to sue the United States and conferred no jurisdiction upon the court below over claims against an Indian as a mere individual aside from his membership of the tribe or dissociated from his dependent condition as an Indian subject because of such condition to the exercise by the United States of governmental supervision and control. The court consequently decided that it was not concerned with any supposed liability of the individual defendants as citizens of the United States resulting from their purely individual and personal contracts and which, therefore, were not related to or connected with tribal membership or the dependency resulting from status as an Indian as distinguished from citizenship. We think the conclusions thus reached by the court are so clearly the necessary result of the text of the act that we content ourselves with referring to that text as a demonstration of their soundness.

2. Concluding that the relevant provisions of § 2103 of the Revised Statutes (which are in the margin [1]) were ap-

[1] SEC. 2103. No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in

plicable and controlling, as the contract alleged was not in writing and did not in other respects conform to the statute, it was held that no right to recover was stated in the petition. Again, we think that the conclusion of the court on this subject is so clearly within the text of the statute that it suffices to direct attention to such text without going further. But if it be conceded for argument's sake that there is ambiguity involved in determining from the text whether the statute is applicable, we are of the opinion that the case as made is so within the spirit of the statute and so exemplifies the wrong which it was intended to prevent and the evils which it was intended to remedy as to dispel any doubt otherwise engendered. Nothing, we think, could more cogently demonstrate this statement than does the development in the court below concerning the claim in controversy: the uncertainty as to the alleged debtor manifested by the claim against the individual members of the tribe as principals and against the tribe as a mere surety, shifting as the exigencies of the case required to a claim against the tribe as principal and secondarily against the members as mere

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present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall be executed before a judge of a court of record, and bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

* * * * * * * *

All contracts or agreements made in violation of this section shall be null and void, . . .

accessories, culminating in a prayer for relief which in and of itself points to the uncertainty with which the transactions referred to were environed. And this is additionally fortified by observing that on the face of the petition it appears that an adequate amount of the labor and property of the tribe or of its individual members passed into the hands of the person designated under the alleged contract and who by its terms was charged with the duty of paying it over for the equipment and supplies furnished. A situation which makes it clear that the controversy is not whether there is a liability express or implied for supplies and equipment received and not paid for, but upon whom the loss must fall resulting from the failure of the person designated under the asserted contract and who received the money, to discharge his duty by paying it over to the furnisher of the supplies who was a party to the alleged contract and in whose interest and for whose benefit presumably the provision as to the retention and paying over of the money was made.

But it is said the statute ought not to be held applicable because the petitioner was a licensed Indian trader authorized to deal with the tribe and its members. But manifestly the right to deal did not confer power to deal by making unlawful contracts. And this consideration also answers the proposition so much insisted upon that because the asserted contract was made in the presence of and with the assent of an agent of the Interior Department, therefore the provisions of § 2103 should not be held applicable. We say the prior reasoning is controlling since it cannot be held that the presence of the agent of the Interior Department authorized the doing of that which was expressly prohibited by law. In other words, that an unlawful contract became lawful because of the presence, at its making, of a public officer whose obvious duty it was to see to it that the law was not violated. Indeed when the prohibitions of § 2103 are considered and the

presence of the representative of the Interior Department at the time the alleged agreement was entered into is borne in mind, if inferences are to be indulged in it is not to be inferred that that which was prohibited by law was done, but rather the assumption should be that instead of leaving the trader who was to furnish the equipment and supplies for utilizing, by the Indians, the dead and down timber to depend for his payment upon the mere force of the contract agreements of the tribe or its individual members, having regard to the interest of the trader and his protection and with his consent it was arranged that the proceeds to arise from marketing the dead and down timber should go into the hands of the Indian agent so that before paying the Indians for their labor, the sum due for the supplies should be paid by the agent to the trader, thus in a sense impounding in the hands of the person selected by him the proceeds for the trader's benefit. And this view answers the contention made that even in the absence of an express contract, there should have been a judgment against the tribe and its members upon the theory of an implied obligation to pay arising from the fact of the receipt by the tribe or its members of supplies or equipment for which they had not paid. True, in a narrow sense it may be said that the case involves the right of the petitioner to be paid for the supplies furnished, but from the point of view of the Indians in a broad sense the case as made involves deciding whether the petitioner should bear the loss of the failure of the agent to pay over to him out of the moneys retained for that purpose, the sum of the advances of supplies, that is to say, whether the Indians after having placed in the hands of the designated person the sum of the supplies are under the obligation to pay again, that is to pay twice.

*Affirmed.*

## APPENDIX B.

### DEMURRER TO CLAIMANT'S ORIGINAL PETITION.

Now come the defendants, by the Attorney General of the United States, and demurring to the petition in this cause, state as the ground thereof that the facts alleged in said petition do not constitute a cause of action within the jurisdiction of this court.

And further demurring to the said petition, state as the ground thereof that the act of May 29, 1908 (35 Stat., 444, 445), referring the claim to this court, was enacted by Congress in violation of certain provisions of the Constitution of the United States, and conferred no jurisdiction upon this court to consider the subject matter of the said petition.

And further demurring to the said petition, state as the ground thereof that the petition does not allege facts sufficient to constitute a cause of action.

## Appendix C.

### AMENDMENTS TO PETITION.

Having been heretofore granted permission by the court, petitioner now makes and files the following amendments to the petition in this case:

1. Amend the petition by inserting in the title of the case the words "and the United States" after the word "Wisconsin," so that the title of the case shall be and stand as follows:

| | |
|---|---|
| F. F. Green<br>*v.*<br>The Menominee Tribe of Indians in Wisconsin and The United States. | No. 30179. |

2. Amend paragraph 2 of the petition by inserting after the words "such Reservation," the following words, "ten per cent of," so as to make the paragraph aver that ten per cent of the proceeds of the sale of the dead and down timber on such reservation should go to the benefit of the tribe.

3. Amend paragraph 2 of the petition by striking out its last sentence and inserting in lieu thereof the following matter:

That the said agreement made with the said M. Wescott was entered into on or about the first day of December, 1881, under the conditions and to the effect stated below. On and before December 1, 1881, the Menominee Indians were in a destitute condition, without credit or available means of support, and had procured the right

to cut and sell the dead and down timber on their reservation, but were unable to engage in such work for the reason that they lacked equipment and supplies necessary for the prosecution thereof, and were unable to secure such equipment and supplies on account of lack of credit. That about said date the Commissioner of Indians Affairs sent one John A. Wright, of Baltimore, Maryland, a special agent, to the Menominee Reservation for the express purpose of making some arrangement whereby the Indians could obtain equipment and supplies necessary for engaging in logging operations. That thereupon a council of the tribe was held at Keshena, Wisconsin, which was attended by all the chiefs and head men of the tribe, and practically all the members thereof, and also by the Indian agent, and it was thereupon agreed by and between the said M. Wescott as one party to the agreement, and the Menominee Indian Tribe as the other party thereto, that the said M. Wescott, the duly licensed Indian trader, at Keshena, Wisconsin, should furnish necessary equipment and supplies to those members of the tribe who desired to engage in logging operations to enable them to carry on such work, and support their respective families while so engaged, such equipment and supplies not to exceed the sum of $2.50 for each thousand feet of logs so cut and sold; that all logs cut and hauled by the Menominee Tribe in the logging operations were to be sold through the Indian agent to the highest and best bidder; and that the prices for such supplies as were to be furnished by the petitioner should be such prices as were being paid in cash for similar supplies in that part of the State, with transportation added; and that said Menominee Tribe promised and agreed that such equipment and supplies so furnished should be paid for out of the first proceeds from the sale of the logs so to be cut and sold. That said agree-

ment was made with the consent and approval of the Indian agent residing at Keshena, Wis., and in charge of said Menominee Indian Reservation, and also by said special agent, John A. Wright. That said agreement had the unanimous approval of all members of the tribe present at said council. That said agreement was made orally by the said M. Wescott, personally, and by the chiefs and head men on behalf of said tribe, which method of agreement then was, and for a long time prior thereto, had been the only method of entering into contracts by said Menominee Tribe of Indians; that the authority of the chiefs and head men of the tribe to contract for and on behalf of the tribe had never been questioned by any member of said tribe; and that contracts so entered into had always been treated as valid and binding on the tribe, and fulfilled by the tribe, without objection on the part of any member thereof. That said agreement and contract with the Menominee Tribe remained in force until the said M. Wescott ceased to be the licensed Indian trader, and your petitioner was duly appointed as such in the fall of 1886.

That on or about the 1st of January, A. D. 1887, it was mutually agreed by and between your petitioner and W. H. Stacy on the one part, and the Menominee Tribe of Indians on the other, that the agreement above set out with M. Wescott should be continued in full force and effect with your petitioner and said W. H. Stacy. That said last-mentioned agreement was made with your petitioner and W. H. Stacy, personally, and on behalf of the Menominee Tribe by the chiefs and head men thereof, which said chiefs and head men still continued to have and were recognized as having authority to make contracts in behalf of and binding on said tribe. That said last-mentioned agreement was approved by the Indian agent at Keshena, Wis., and was acquiesced in by all

members of said tribe, and treated by all parties interested as valid and binding on the contracting parties. That your petitioner and the said W. H. Stacy furnished the equipment and supplies for which judgment is claimed in this action, in accordance with and relying upon said agreement, and did not and would not extend credit to the individual members of said tribe, but extended such credit solely to the tribe, relying upon said agreement.

DUDLEY & MICHENER,
*Attorneys for Petitioner.*

DISTRICT OF COLUMBIA, *ss*:

Louis T. Michener, being duly sworn, deposes and says that he is a member of the partnership of Dudley & Michener, such partnership being authorized by power of attorney in this case filed, to make affidavit; that he has read and understands the foregoing amendments to the petition; and that he is informed and believes that the statements therein contained are true in substance and in fact.

LOUIS T. MICHENER.

Subscribed and sworn to before me this 11th day of March, 1911.

[SEAL.]

HERBERT L. FRANC,
*Notary Public, District of Columbia.*

## Appendix D.

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Department of the Interior,
Office of Indian Affairs,
*Washington, November 28, 1881.*

E. Stephens,
*United States Indian Agent,*
*Green Bay Agency, Wis.*

Sir: I notice in your annual report a statement that the Indians of your agency complain that they are not allowed to dispose of the dead and down timber going to waste on their reserve.

You are hereby informed that the sale of such timber is allowed by this office; but great care must be taken by you to see that the Indians dispose of only surplus dead or down wood which without such disposition would soon become worthless, and that they do not take advantage of this permission to cut other timber, in violation of section 262, "Instructions to Indian agents."

Personal oversight should be exercised by you of the bargains and sales made by Indians under this authority, and that they should understand that a failure to observe the restrictions of this permission will result in a forfeiture of the permit.

Yours, respectfully,

H. Price,
*Commissioner.*



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## GREEN *v.* MENOMINEE TRIBE.

APPEAL FROM THE COURT OF CLAIMS.

No. 285. Argued March 13, 16, 1914.—Decided May 11, 1914.

Section 2 of the act of May 29, 1908, c. 216, 35 Stat. 144, conferring jurisdiction on the Court of Claims to hear and determine claims of certain Indian traders against the Menominee Tribe of Indians and certain members thereof, created no new right in favor of such traders except removal of the bar of limitations, and gave no right to sue the United States or any member of the Tribe in his individual capacity

as disassociated from his dependent condition as an Indian subject.

A contract by a tribe of Indians to guarantee payment of supplies to individual members thereof must conform to § 2103, Rev. Stat.

A claim for lumber equipment furnished to individual members of a tribe of Indians on the guarantee of the Tribe based on an agreement that the proceeds of the lumber cut should, to the extent permitted by the Government, pass through the hands of an agent and be applied to payment for the equipment cannot be enforced, under the act of May 29, 1908, against the Tribe or the Indians as members thereof or the United States when it appears that such proceeds of the lumber were collected by the agent and misapplied.

The right of a licensed Indian trader to deal with Indian tribes and individual Indians does not extend to making unlawful contracts.

47 Ct. Cl. 281, affirmed.

THE facts, which involve a claim against the Menominee Tribe for supplies furnished to individual members of the Tribe and the jurisdiction of the Court of Claims to consider such claim under the act of May 29, 1908, are stated in the opinion.

*Mr. L. T. Michener*, with whom *Mr. P. G. Michener* and *Mr. C. F. Dillett* were on the brief, for appellant:

Full jurisdiction was conferred on the Court of Claims by § 2, act of May 29, 1908, 35 Stat. 444.

Appellant had the right to make the United States a party defendant to this action.

Congress had power to confer jurisdiction on the Court of Claims to adjudicate this case, even if the Indians were and are citizens of the United States.

The Secretary of the Interior and other officers have broad powers in dealing with Indian affairs.

The statutes conferred on the traders the right to trade with the Indians.

The agreement sued on related to dead and down timber and was made lawfully.

The petition alleges facts sufficient to constitute a cause of action.

Rev. Stat., § 2103, does not apply to the contract in the case at bar.

In support of these contentions, see *Blackfeather* v. *United States*, 155 U. S. 180, and 190 U. S. 368; *Braden's Case*, 16 Ct. Cls. 389; *Campbell* v. *Holt*, 115 U. S. 620; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Clark* v. *United States*, 95 U. S. 539; *Dahlgren's Case*, 16 Ct. Cls. 30; *Delaware Indians* v. *Cherokee Nation*, 193 U. S. 127; *Ex parte Wall*, 107 U. S. 265; *Journeycake* v. *Cherokee Nation*, 155 U. S. 196; *La Abra Mining Co.* v. *United States*, 175 U. S. 423; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *McElrath* v. *United States*, 102 U. S. 426; *Navarre's Case*, 33 Ct. Cls. 235; 173 U. S. 77; *Neal's Case*, 14 Ct. Cls. 280; *Nor. Pac. R. R. Co.* v. *Lewis*, 162 U. S. 366; *Roberts* v. *United States*, 92 U. S. 539; *Sac and Fox Indians Case*, 220 U. S. 481; *Tiger* v. *West. Invest. Co.*, 221 U. S. 286; *Townsend* v. *Little*, 109 U. S. 504; *United States* v. *Celestine*, 215 U. S. 278; *United States* v. *Cook*, 19 Wall. 591; *United States* v. *Nix*, 189 U. S. 199; *United States* v. *Rickert*, 188 U. S. 278.

*Mr. Assistant Attorney General Thompson* for the United States:

Appellant has attempted to set up a new and different agreement in his amended petition.

The United States have not been properly made a party defendant.

Congress has no power to refer controversies between residents of the same State to the Court of Claims.

Congress has no power to waive the statute of limitations in this case.

Service of notice was necessary in order to give Court of Claims jurisdiction of the persons of defendants.

Property rights of individual Menominee Indians are protected by state laws of Wisconsin.

Individual tribal Indians have the right to sue and be sued in the courts of States where they reside.

There is no liability on the tribe under an oral agreement.

The tribe is not liable for the negligence or torts of the Indian agent.

In support of these contentions, see *Alter's Appeal*, 67 Pa. St. 34; 15 Am. & Eng. Ency., 2d ed., 11, 12; *Brown* v. *United States*, 44 Ct. Cls. 283, 311; *Bank of Columbia* v. *Okely*, 4 Wheat. 234, 242; *Cohens* v. *Virginia*, 6 Wheat. 264, 293; *Clement* v. *Sigur*, 29 La. Ann. 798, 802; *Ex parte Wall*, 107 U. S. 265, 289; *Felix* v. *Patrick*, 145 U. S. 317, 332; *Finn* v. *United States*, 123 U. S. 227; *Forbes* v. *Mitchell*, 1 J. J. Marsh. 440, 441; *Green* v. *Menominee Indians*, 46 Ct. Cls. 68, and 47 Ct. Cls. 281; *Gho* v. *Julles*, 1 Wash. Ter. 325, 329; *Godfroy* v. *Scott*, 70 Indiana, 259; *Hitchcock* v. *United States*, 22 App. D. C. 275; *Hite* v. *Hite*, 2 Rand, 409, 417; *Ingraham* v. *Ward*, 56 Kansas, 550; *Justices* v. *Murray*, 9 Wall. 274, 287; *Ke-tuc-e-mun-guah* v. *McClure*, 122 Indiana, 541; *Langford* v. *United States*, 101 U. S. 341, 345; *La Abra Mining Co.* v. *United States*, 175 U. S. 423; *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272, 276; *McElrath* v. *United States*, 102 U. S. 426, 439; *Palairet's Appeal*, 67 Pa. St. 479; *Rubideaux* v. *Vallie*, 12 Kansas, 38, 52; *Stacy* v. *La Belle*, 99 Wisconsin, 520, 524; *Schick* v. *United States*, 195 U. S. 71, 72; *Swartzel* v. *Rogers*, 31 Kansas, 374; *Stewart* v. *United States*, 206 U. S. 185; *United States* v. *Kagama*, 118 U. S. 375; *United States* v. *Klein*, 13 Wall. 128; *United States* v. *Flournoy*, 69 Fed. Rep. 891; *United States* v. *Mille Lac Indians*, 229 U. S. 498; *Vigo's Case*, 21 Wall. 648; *Woodford* v. *Baker*, 10 Oregon, 491, 494; *Water Valley* v. *Seamen*, 53 Mississippi, 655, 660. See also act of May 29, 1908 (jurisdictional act), 35 Stat. 445, 446; act of March 31, 1882 (ratifying permit), 22 Stat. 36, 37; acts of June 12, 1890 (showing how tribal fund was created), 26 Stat. 146, and June 28, 1906, 34 Stat. 547; Const. U. S., Art. III, §§ 1 and 2; Fifth and Seventh Amendments; Const. Wisconsin, Art. 1, § 5; *Id.*, Art. 75,

§ 20; Statutes Wisconsin, §§ 2629, 2630, 4222, 4225; Judicial Code, §§ 24, 145, 233, 235.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

By this appeal a review is sought of a judgment of the court below holding that an amended petition filed by the appellant stated no cause of action and dismissing the same. (47 Ct. Cls. 281.) Our attention therefore must be directed to the petition, but as a means of at once clarifying the issues, we refer to the act of Congress authorizing the suit and briefly state the averments of an original petition which was likewise dismissed because stating no cause of action.

By an act of Congress of May 29, 1908 (35 Stats. 444, c. 216, § 2), jurisdiction was conferred upon the Court of Claims "to hear, determine, and render final judgment, notwithstanding lapse of time or statute of limitation, for any balances found due, without interest, with the right of appeal as in other cases," upon the claims of eight named persons who were described in the act as "traders," against the "Menominee tribe of Indians in Wisconsin and against certain members of said tribe at the Green Bay Agency, for supplies, goods, wares, merchandise, tools, and live stock furnished certain members of the said tribe after the first day of January, in the year eighteen hundred and eighty, for the purpose of carrying on logging operations upon the Menominee Indian Reservation, in Wisconsin." The statute further provided: "Said court shall, in rendering judgment, ascertain and determine the amount, if any, due upon each of said claims, and if the court find that there is a liability upon any of said claims, it shall then determine if such liability be that of the said Menominee tribe of Indians as a tribe or that of individual members of said tribe, and it shall

render judgment for the amount, if any, found due from said tribe to any of said claimants, and it shall render judgments for the amounts, if any, found due from any of the individual members of said tribe to any of said claimants." The statute then provided the means by which the judgments, if any were rendered, whether against the tribe or against individual Indians, should be paid.

Green, the appellant, one of the traders named in the act, sought to recover from the Menominee tribe and 158 named members thereof an amount alleged to be the price of certain equipment and supplies alleged to have been furnished by him. The liability of the individual Indians was based upon averments that they had received during the years 1886 to 1889 the amount of the equipment and supplies sued for, and that they had contracted to pay for the same, the supplies having been furnished them to enable them to carry on logging operations on the Menominee Reservation in Wisconsin. The liability of the tribe was based on averments that it had expressly guaranteed that the individual Indians, members of the tribe, would pay for the supplies furnished them for the purposes and under the circumstances alleged. The defendants jointly demurred on two grounds: first, that the act conferring authority to bring suit was repugnant to the Constitution, and second, because the petition stated no cause of action. Holding that Congress had the undoubted power to pass the jurisdictional act, the court overruled the first ground. It also overruled the second ground as to the individual members of the tribe who were made defendants, but it sustained the exception of no cause of action as to the tribe, the court holding that "under the averments of the petition the Menominee Tribe of Indians is but a naked guarantor for the debt of another, and such promise not being in writing is void under the statute of frauds." The suit, as to the tribe, was therefore dismissed.

By leave, an amended petition was filed stating a new cause of action and joining the United States as defendant. This petition after alleging that the petitioner was a citizen of the United States and a resident of Wisconsin and after counting upon the jurisdictional act, made in substance the following averments: That in 1881 the Menominee Indians on the reservation were in a destitute condition and to save them and their families from starvation, the United States granted them permission to cut and sell the dead and down timber on the reservation "ten per cent. of the proceeds to go to the benefit of the said tribe and of those performing labor in that respect." That when it developed that the Indians, because of their extreme poverty and want of credit could not procure the equipment and supplies which were essential to enable them to make use of the permission, the Commissioner of Indian Affairs sent a special agent, John A. Wright, to the Reservation to make some arrangement whereby such condition could be remedied. That a council of the tribe was thereupon held, attended by all the chiefs and head men and practically all the members of the tribe, and it was agreed by and between the then Indian Trader, M. Wescott, "as one party to the agreement, and the Menominee Indian Tribe as the other party thereto, that the said M. Wescott, the duly licensed Indian Trader, at Keshena, Wisconsin, should furnish necessary equipment and supplies to those members of the tribe who desired to engage in logging operations to enable them to carry on such work, and support their respective families while so engaged, such equipment and supplies not to exceed the sum of $2.50 for each thousand feet of logs so cut and sold; that all logs cut and hauled by the Menominee Tribe in the logging operations were to be sold through the Indian Agent to the highest and best bidder; and that the prices for such supplies as were to be furnished by the petitioner, should be such prices as were being paid in cash for similar

supplies in that part of the State, with transportation added; that said Menominee Tribe promised and agreed that such equipment and supplies so furnished should be paid for out of the first proceeds from the sale of the logs so to be cut and sold. That said agreement was made with the consent and approval of the Indian Agent residing at Keshena, Wisconsin, and in charge of said Menominee Indian Reservation, and also by said special agent, John A. Wright. That said agreement had the unanimous approval of all members of the tribe present at said council. That said agreement was made orally by the said M. Wescott, personally, and by the chiefs and head men on behalf of said tribe. . . ." It was alleged that the agreement thus made was carried out by the tribe and by Wescott who made advances for the purposes of the operations in cutting the dead and down timber and continued to do so until the year 1886 when Wescott ceased to be the Indian trader and was succeeded by Green, the petitioner, and one Stacy whose rights the petitioner Green had acquired. The petition then charged that as the condition of destitution and inability to obtain equipment and supplies which had led to the making of the agreement with Wescott yet prevailed after petitioner and Stacy became the Indian traders, on the first of January, 1887, it was agreed between petitioner and Stacy and the tribe that the previous agreement should be continued in full force and effect with petitioner and Stacy, the petition expressly averring that "said last mentioned agreement was made with your petitioner and W. H. Stacy, personally, and on behalf of the Menominee Tribe by the chiefs and head men thereof, which said chiefs and head men still continued to have and were recognized as having authority to make contracts in behalf of, and binding on said tribe. That said last mentioned agreement was approved by the Indian Agent at Keshena, Wisconsin, and was acquiesced in by all members of said tribe, and treated by all

parties interested as valid and binding on the contracting parties."

It was averred that up to 1889 supplies were furnished in accordance with the agreement with the approval of the Indian agent and the United States, and with a few exceptions were paid for by the methods pointed out by the contract; that during the year 1889, however, supplies amounting to $13,087.46 were furnished to 158 members of the tribe, the name of each member and the amount supplied him being stated, for which payment had not been made either by the Indians, the tribe, or the United States.

It was further averred that such unpaid for supplies were furnished "in accordance with and relying upon said agreement" and that petitioner and Stacy "did not and would not extend credit to the individual members of said tribe, but extended such credit solely to the tribe, relying upon said agreement." It was further alleged that the proceeds from the sales of the dead and down timber cut and hauled by the Indians were received by the Indian agent and if the amounts which came into his hands in accordance with the contract and which were subject by its terms to be applied to the payment of the supplies advanced under the terms of the agreement had been so applied, all the supplies would have been paid for, but that they remain unpaid for because "such proceeds were not so applied." After averring that the logging operations and the credits extended by the petitioner and Stacy were for the benefit of the tribe, the petition charged that "there is a large fund in the possession of the United States to the credit and for the benefit of said Menominee Tribe of Indians, derived through their logging operations, and now amounting to more than a million and a half of dollars, which fund has been accumulated through the credit extended and assistance rendered by licensed traders to the Menominee Indians in logging operations,"

but there was no averment that such sum or any part thereof was derived from payments made to the United States by the Indian agent of any portion of the sum derived from the ten per cent. provided for in the contract and which, it was contemplated would be used by the Indian agent for the purpose of paying the trader for the supplies furnished by him. There was also no averment that the money to the extent of the amount of the supplies which was received by the Indian agent out of the funds of the Indians and which was not by him applied to pay for the supplies, was ever turned over to the Indians or that they became in any way the beneficiaries thereof.

The petition concluded with the following averment and prayer:

"Your petitioner avers that there is due him from the Menominee Tribe of Indians, or from the individual members thereof, as may be found and adjudicated by the court, the sum of Thirteen Thousand and Eighty-seven Dollars, Forty-six Cents ($13,087.46).

"Wherefore the petitioner prays judgment for Thirteen Thousand and Eighty-seven Dollars, Forty-six Cents ($13,087.46)."

By a general demurrer the defendants besides questioning the right to file the amended petition on the ground that it constituted an entire departure, and insisting in any event that, if there was a right to file it, its averments did not state a cause of action, denied the right to implead the United States as a defendant and challenged the constitutionality of the jurisdictional act. The court without specifically directing its attention to the other grounds came to consider whether the amended petition stated a cause of action and deciding that it did not, dismissed the cause, and as we at the outset said, the rightfulness of its action in so doing is the matter we are called upon to decide.

The contentions pressed upon the one side to sustain the correctness of the conclusion of the court below and

on the other to demonstrate the existence of reversible error, all but involve an examination of the reasoning which led the court to its conclusion and we think the most direct way to dispose of the case will be to state under separate headings the propositions to which the court gave its sanction and the reasons relied upon to establish that error was committed.

1. The court held that the jurisdictional act except so far as concerned the statute of limitations created no new right in favor of the petitioner, but simply afforded a means of establishing by a proceeding in the Court of Claims the existence, if any, of a claim against the tribe and the individual members of the tribe as such. From this premise the conclusion was deduced that the act gave no right to sue the United States and conferred no jurisdiction upon the court below over claims against an Indian as a mere individual aside from his membership of the tribe or dissociated from his dependent condition as an Indian subject because of such condition to the exercise by the United States of governmental supervision and control. The court consequently decided that it was not concerned with any supposed liability of the individual defendants as citizens of the United States resulting from their purely individual and personal contracts and which, therefore, were not related to or connected with tribal membership or the dependency resulting from status as an Indian as distinguished from citizenship. We think the conclusions thus reached by the court are so clearly the necessary result of the text of the act that we content ourselves with referring to that text as a demonstration of their soundness.

2. Concluding that the relevant provisions of § 2103 of the Revised Statutes (which are in the margin [1]) were ap-

[1] SEC. 2103. No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in

plicable and controlling, as the contract alleged was not in writing and did not in other respects conform to the statute, it was held that no right to recover was stated in the petition. Again, we think that the conclusion of the court on this subject is so clearly within the text of the statute that it suffices to direct attention to such text without going further. But if it be conceded for argument's sake that there is ambiguity involved in determining from the text whether the statute is applicable, we are of the opinion that the case as made is so within the spirit of the statute and so exemplifies the wrong which it was intended to prevent and the evils which it was intended to remedy as to dispel any doubt otherwise engendered. Nothing, we think, could more cogently demonstrate this statement than does the development in the court below concerning the claim in controversy: the uncertainty as to the alleged debtor manifested by the claim against the individual members of the tribe as principals and against the tribe as a mere surety, shifting as the exigencies of the case required to a claim against the tribe as principal and secondarily against the members as mere

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present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall be executed before a judge of a court of record, and bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

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All contracts or agreements made in violation of this section shall be null and void, . . .

accessories, culminating in a prayer for relief which in and of itself points to the uncertainty with which the transactions referred to were environed. And this is additionally fortified by observing that on the face of the petition it appears that an adequate amount of the labor and property of the tribe or of its individual members passed into the hands of the person designated under the alleged contract and who by its terms was charged with the duty of paying it over for the equipment and supplies furnished. A situation which makes it clear that the controversy is not whether there is a liability express or implied for supplies and equipment received and not paid for, but upon whom the loss must fall resulting from the failure of the person designated under the asserted contract and who received the money, to discharge his duty by paying it over to the furnisher of the supplies who was a party to the alleged contract and in whose interest and for whose benefit presumably the provision as to the retention and paying over of the money was made.

But it is said the statute ought not to be held applicable because the petitioner was a licensed Indian trader authorized to deal with the tribe and its members. But manifestly the right to deal did not confer power to deal by making unlawful contracts. And this consideration also answers the proposition so much insisted upon that because the asserted contract was made in the presence of and with the assent of an agent of the Interior Department, therefore the provisions of § 2103 should not be held applicable. We say the prior reasoning is controlling since it cannot be held that the presence of the agent of the Interior Department authorized the doing of that which was expressly prohibited by law. In other words, that an unlawful contract became lawful because of the presence, at its making, of a public officer whose obvious duty it was to see to it that the law was not violated. Indeed when the prohibitions of § 2103 are considered and the

presence of the representative of the Interior Department at the time the alleged agreement was entered into is borne in mind, if inferences are to be indulged in it is not to be inferred that that which was prohibited by law was done, but rather the assumption should be that instead of leaving the trader who was to furnish the equipment and supplies for utilizing, by the Indians, the dead and down timber to depend for his payment upon the mere force of the contract agreements of the tribe or its individual members, having regard to the interest of the trader and his protection and with his consent it was arranged that the proceeds to arise from marketing the dead and down timber should go into the hands of the Indian agent so that before paying the Indians for their labor, the sum due for the supplies should be paid by the agent to the trader, thus in a sense impounding in the hands of the person selected by him the proceeds for the trader's benefit. And this view answers the contention made that even in the absence of an express contract, there should have been a judgment against the tribe and its members upon the theory of an implied obligation to pay arising from the fact of the receipt by the tribe or its members of supplies or equipment for which they had not paid. True, in a narrow sense it may be said that the case involves the right of the petitioner to be paid for the supplies furnished, but from the point of view of the Indians in a broad sense the case as made involves deciding whether the petitioner should bear the loss of the failure of the agent to pay over to him out of the moneys retained for that purpose, the sum of the advances of supplies, that is to say, whether the Indians after having placed in the hands of the designated person the sum of the supplies are under the obligation to pay again, that is to pay twice.

*Affirmed.*